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REPORTS

OF

CASES DECIDED

IN THE

HIGH COURT OF CHANCERY

OF

MARYLAND.

BY THEODORICK BLAND,
CHANCELLOR.

VOL. I.

BALTIMORE:
PUBLISHED BY JOSEPH NEAL.

1836

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PREFACE.

On receiving the appointment of Chancellor, I determined to make every effort to acquire a competent knowledge of the *peculiar principles and practice* of the Court of Chancery of Maryland, to which my attention had been so rarely drawn, and for which I had had, for many years in the judicial stations I previously held, so little use. Upon inquiry I soon found, that any thing like an accurate knowledge of those *peculiarities* was only to be gathered from the records themselves; to which I therefore resorted, and after a careful perusal noted the course of proceeding, and occasionally made short digests of such cases as appeared most likely to be useful thereafter. In this way I collected a considerable mass of information, which has greatly facilitated my official labours.

It is of no less importance to the people than to the profession, that the *peculiar* principles and practice of the court, as well as the general rules of law, should be clearly made known to all; which it is obvious can in no way be so well done as by the usual mode of publishing reports of cases as they have actually occurred and been disposed of. For a time I had reason to hope, that some member of the bar would report the cases as they were decided subsequent to my appointment; but when that hope failed I determined to undertake the work myself. The task, I was aware, would be attended with many difficulties and much labour; and the more so to me, because of the manifold interruptions

occasioned by the heavy current of business continually pressing through the court.

On reflecting upon the nature of the undertaking I deemed it proper to begin with the earliest of my own decisions, taking them up in chronological order according to the date of the last material adjudication in each case, and to make such a selection from them as would give to the profession the greatest amount and variety of information within the smallest compass. I have rarely or never preserved my notes of the arguments of counsel after my decision has been pronounced; and therefore it has been entirely out of my power to give even the usual skeleton of the arguments of solicitors; many of which have been distinguished by great ability; and from most of which I have derived much instruction. To make up in some degree for this defect, I have taken pains so to digest the pleadings, and to state the circumstances as to present a full view of all the points which had been, or could have been made in the case; and to render the decisions as useful as possible I have revised the reasons for them all, and have so recast and enlarged some as to comprehend all the points which apparently might have been made. In each case I have given references to all the authorities deemed pertinent and within my reach; and have also inserted, from the records, by way of notes, short reports of a number of cases decided by my predecessors.

Although *The Chancellor's Case* cannot in any way be considered as a controversy which had been adjudicated upon by the Court of Chancery, it is nevertheless a determination of the General Assembly in relation to the sole judge of that tribunal which involved the examination and discussion of subjects of the most interesting nature; and is a decision

of the legislative department upon a question of constitutional law of the most vital importance to the Chancellor in particular, and to the judicial department in general. It therefore appeared to have a most undeniable claim to go before the public in a permanent form as an associate with the decisions of that Chancellor whose constitutional securities had been so severely questioned.

The discharge of my official duties has heretofore left me so little time to turn my attention to any thing else, that the preparation of this first volume of Reports has been much longer delayed than I had calculated upon. It is now however submitted to the candour of a generous and enlightened profession.

THEODORICK BLAND.

Annapolis, December, 1835.

A LIST

OF

THE CHANCELLORS OF THE STATE OF MARYLAND.

RICHARD SPRIGG, appointed by the General Assembly, 3d of April, 1777; resigned March 1778.

JOHN ROGERS, appointed by the Governor and Council, 20th of March 1778; died 1789.

ROBERT HANSON HARRISON, 1st October 1789; declined accepting.

ALEXANDER CONTEE HANSON, 3d October 1789; died 1806.

GABRIEL DUVALL, 20th January 1806; declined accepting.

ROBERT SMITH, 23d January 1806; declined accepting.

WILLIAM KILTY, 26th January 1806; died 1821.

JOHN JOHNSON, 15th October 1821; died 1824.

THEODORICK BLAND, 16th August 1824.

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CASES DECIDED

IN THE

HIGH COURT OF CHANCERY

OF MARYLAND.

RINGGOLD'S CASE.

The right of appeal at common law and in equity;—in what cases it is allowed; and how far it may be controlled by the inferior court from whose decision the appeal is taken;—in what cases, and to what amount an appeal bond may be required; and how such bonds are examined, rejected, or approved.

This suit was instituted here in January, 1811, by the plaintiffs, who were the *cestui que trusts*, under a deed of trust, against Samuel and Tench Ringgold, to obtain an account of the trust property, and the payment and delivery of the balance in their hands. And by a final decree of this court of the 30th of September, 1824, the defendants were ordered to pay to the plaintiffs, on or before the first of December then next, the sum of *fifty-three thousand eight hundred and fifty-seven dollars and seventy-nine cents*, with interest on *thirty-nine thousand four hundred and eighty dollars and forty-six cents*, part thereof, from the first of July, 1823, until paid, and costs. (*a*)

From this decree the defendants appealed; and on the 20th of October, 1824, the plaintiffs, by their petition, stated, that the defendant Samuel had conveyed all, or nearly all, his property to trustees for the payment of his debts; and they were apprehensive, that those trustees would be offered as sureties in the *appeal bond*. Upon which they prayed, that they might, on the filing of an appeal bond, be allowed to shew cause against the sufficiency of any sureties that might be offered, as the amount decreed to them was very considerable; and they were willing, that the issuing of execution on the decree should be suspended until the matter could be heard.

(*a*) Ringgold *v.* Ringgold, 1 H. & G. 32.

On the 3d of November, 1824, an appeal bond, in the usual form, was filed, executed by the defendant, Samuel Ringgold, and by Samuel Ringgold, Junr., and Isaac Swearingen, as his sureties. On which bond there was a certificate, signed by William Price, a solicitor of this court, in these words: "I believe the above bond to be good for the penalty therein mentioned, 28th October, 1824."

On the 8th of November, 1824, the plaintiffs, by their petition, objected, that the sureties in the appeal bond were wholly insufficient; that Samuel Ringgold, Junr., had no independent means to justify his suretiship; that Swearingen had but inconsiderable property, if any, in comparison with the vast amount for which he was offered as surety—his employment, for a long period, having been only that of an overseer, or manager, of the estate of the defendant Samuel; that the defendant Samuel had, some time before, conveyed to those sureties all his estate for the payment of his debts then due; and, that it was doubtful whether the property, so conveyed to them, could be deemed liable to the debt decreed to be paid to the plaintiffs. To this petition was annexed an affidavit of Mary Ringgold, one of the plaintiffs, in which she stated, that those sureties were not sufficient; and, according to her information, they were far from having means to meet, or support their responsibility as such sureties. Upon which the petitioners prayed, that they might be allowed to shew cause, and to take testimony in relation to the sufficiency of the sureties offered.

9th November, 1824.—Bland, *Chancellor*, Ordered, that the matter of this Petition be heard during the second week of the ensuing December term: And, that proofs be taken, as to the sufficiency of the sureties offered, before any Justice of the Peace, by either party, on giving reasonable notice of the time and place of taking the same to the opposite party, or their solicitor. And it is further Ordered, that the issuing of execution on the final decree in this case be stayed until the hearing of the matter of this petition or further order.

Under this order proofs were taken on the part of the defendant Samuel Ringgold, which, together with the deed of trust from him to Swearingen and Samuel Ringgold, Junr., and the inventory of the property conveyed by it, were returned and filed.

30th December, 1824.—Bland, *Chancellor*. The amount decreed to be paid having given to this matter a more than usual degree of importance; and the prayer of the petition calling for an expression

of the Court's opinion as to the nature and extent of the citizen's right of appeal, I therefore deemed it proper to appoint a day for hearing, so as to allow an interval within which the parties might be permitted to take testimony in support of their allegations, and so as to give time to look into the practice of the Court in relation to appeals, for the purpose of having the subject carefully reviewed and maturely considered.

It has always been regarded here, as well as in England, as a constitutional right of every citizen to have his case reviewed, in one form or other, by a court of error. (*b*) Under the Provincial government, this right of the citizen to have a revision of a judgment, in any civil case, affecting his interests, was extended, in many instances, beyond the court of the last resort, in the Province, to the king in council. (*c*) In reference to which extended right of appeal, the Constitution of the Republic has emphatically declared, "that there be a Court of Appeals, composed of persons of integrity and sound judgment in the law, whose judgment shall be final and conclusive in all cases."(*d*) So as thereby, in the most distinct and positive terms, to exclude and prevent the further prosecution of appellate proceedings, in any case, from that ultimate tribunal of the Republic, as had been before allowed under the government of the Province. (*e*)

This right of appeal seems to have been conceded to the citizen by the common law, in all civil cases, without check, or control of any kind whatever. (*f*) A writ of error was granted, on demand, as a matter of right;(*g*) and, if the appellant was at all apprehensive, that proceedings, in execution of the judgment which had been so taken up by the writ of error, would not be stayed, he might, as of course, sue out a writ of *supersedeas* for the purpose of having all such proceedings suspended until a decision was had upon the writ of error. (*h*) The form of the writ of *supersedeas*, which followed, as the adjunct and auxiliary of the writ of error, was thus, "that if the judgment be not executed before the *supersedeas*, the Sheriff is to stay from executing any process of execution until the writ of error is determined." (*i*) Hence it was, and not from the quaint notion, that an execution being an entire thing which, when once begun, must be completed, that, if the *fieri*

(*b*) Christie *v.* Richardson, 3 T. R. 78.—(*c*) 1773, ch. 7, s. 5.—(*d*) Const. art. 56. (*e*) Hammond *v.* Ridgely, 5 H. & J. 268.—(*f*) Tidd, Pra. 1071.—(*g*) D. Regina *v.* Paty, 2 Salk. 504.—(*h*) Jac. L. Dic. *vide Supersedeas.*—(*i*) Meriton *v.* Stevens, Willis, 281.

facias had been levied, the Sheriff was bound to sell the goods and bring the money into court to abide the event of the writ of error. And this becomes the more evident on adverting to the fact, that, in many other cases, where no such special directions were given to the Sheriff, the proceedings, in execution of the judgment, were intercepted and cut short at the very point at which the writ of error or *supersedeas* might happen to find them. (*j*) But it has been long established, that the writ of error, with an approved bond to prosecute it with effect, of itself, operates as a stay of further proceedings to the same extent, that might have been specially directed by a writ of *supersedeas;* which writ, owing to that, although formerly always sued out in this State, (*k*) has long since become obsolete, and is now never resorted to as a mere auxiliary to a writ of error in any case whatever. (*l*)

But, although the right to appeal, in civil cases at common law, was thus, for a long time, admitted to be absolute and beyond control; yet it was limited in its range to such facts as would have manifestly required a different course of proceeding and judgment, had they been made known to the Court; and to such errors in law as appeared upon the face of the record itself. And these errors in law, according to the common law mode of proceeding, could rarely be any thing more than such points of law as arose out of the allegations of the parties, in which no part of the evidence, which might have been offered in support of them, could appear; although, as to such evidence, and in their direction to the jury, the Court might have fallen into many and great errors. Hence it was, that the parties were, by statute, allowed to have any such matter inserted in the record, in the form of a bill of exceptions, so as to have the decision, in relation to it, revised and corrected, if erroneous, in a court of error. (*m*) But, whether the errors complained of were in fact, or in law; or whether they arose in an interlocutory proceeding, or in the last act of the Court, the party was not allowed to intercept the case in its progress, or to exercise his right of appeal, until the court of original jurisdiction had pronounced its final judgment; as in partition or account there could be no writ

(*j*) Jac. L. Dic. *vide Supersedeas.*—(*k*) Land. H. A. 146. Chan. Pro. lib. C. D. 368. A fee was formerly allowed to the Chancellor, which was afterwards directed to be paid into the treasury, for putting the great seal to a writ of error, and also a distinct fee for putting the great seal "to a *supersedeas* thereupon"—1763, ch. 18, s. 88; Oct. 1777, ch. 13; November, 1779, ch. 25, s. 22.—(*l*) 2 Bac. Abr 477.—(*m*) Tidd, Pra. 787; 1 Hal. Const. H. Eng. 9, note.

of error allowed, but upon the final judgment;(*n*) nor could any writ of error be brought to reverse even what might be called a final judgment upon any matter which rested in the mere discretion of the Court,(*o*) as for its refusal to continue a case;(*p*) or to grant a new trial;(*r*) or to reinstate a case after a nonsuit or dismissal;(*s*) or to allow a plea to be amended, or a new one to be filed;(*t*) or the allowance of a commission between the discretionary limits of five and ten per cent. as prescribed by the acts of assembly.(*u*) And as a party cannot, with reason, complain of the error of a judgment which he had, by his negligence, suffered to go against himself, or which he had expressly consented should be passed, he is not allowed to have a writ of error upon a judgment by default against him;(*w*) nor where the proceeding or judgment was had by consent, or it had been agreed, that no writ of error should be brought.(*x*) These general limitations as to the range of the right of appeal, it is evident, are all of them well calculated to keep its exercise in order, and so far to prevent it from being abused.

But it having been found, that this absolute right of appeal, even in cases in which it was clearly allowable, had been often abused, by being perverted to the mere purposes of delay, and by being made the means of putting the plaintiff's claim again at hazard, after it had been at great trouble and expense sufficiently authenticated in a court of original jurisdiction, it appears, that a long series of efforts have been made to prevent or correct the evil without materially impairing the benefit of the right of appeal itself.

So far back as the year 1485, the Court of King's Bench, laid it down as a rule of that court, that no writ of error in parliament should be allowed until some error was shown to it in the record, lest it should be brought on purpose to delay execution.(*y*) And in the next year, it was provided by the statute, that the party should recover his costs, and damages for his delay, and wrongful vexation in the same by the discretion of the court before whom

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(*n*) 2 Bac. Abr. 454; Samuel *v.* Juden, 6 East, 333.—(*o*) Davis *v.* The State, 3 H. & J. 154; Gover *v.* Cooley, 1 H. & G. 7; Liter *v.* Green, 2 Wheat. 306; Parsons *v.* Bedford, 3 Peters, 445; Boyle *v.* Zacharia, 6 Peters, 648.—(*p*) Wood *v.* Young, 4 Cran. 237.—(*r*) Henderson *v.* Moore, 5 Cran. 11; Marine In. Co. *v.* Young, 5 Cran. 187.—(*s*) United States *v.* Evans, 5 Cran. 280; Welch *v.* Mandeville, 7 Cran. 152.—(*t*) Marine In. Co. *v.* Hodgson, 6 Cran. 206.—(*u*) 1798, ch. 101, subch. 10, s. 2; Nicholls *v.* Hodges, 1 Peters, 562; 1828, ch. 26, s. 5.—(*w*) Hawkins *v.* Jackson, 6 H. & J. 151, note.—(*x*) Dormer's Case, 5 Co. 40; Clare *v.* Linch, T. Raym. 372; Wright *v.* Nutt, 1 T. R. 388; Camden *v.* Edie, 1 H. Blac. 21.—(*y*) Tidd, Pra. 1074.

the writ of error was sued.(*z*) In the year 1581, it was made a rule of the Court of Common Pleas, that no *supersedeas* should be made upon any writ of error to reverse a judgment of that court until some manifest or pregnant error therein should be notified by the party, or his counsel, to the court or one of its judges.(*a*) In the year 1605, it was further provided, by statute, that in certain enumerated cases, no execution should be stayed upon any judgment unless the person, in whose name the writ of error was brought, should, with two sureties, acknowledge himself bound in a recognizance in double the sum recovered, to prosecute his writ of error with effect,(*b*) and by another statute, passed in the year 1661, the provisions of the previous law were extended to other cases, and it was declared, that, in case the judgment should be affirmed, the defendant in error should have awarded to him double costs for the delay of execution. (*c*) Soon after which, in the year 1664, the provisions of these statutes were further extended to almost all other cases, including by name, *dower* and *ejectment;* and it was declared, that, in case the judgment should be affirmed, the defendant should recover such costs, damages, and sums of money as should be awarded to him; and further, that the court wherein the execution ought to be granted, upon such affirmation, should issue a writ of inquiry, as well of the mesne profits as of damages by any waste committed after the first judgment in dower or ejectment; and thereupon judgment should be given and execution awarded for the amount thereof.(*d*)

In addition to these statutory provisions upon this subject, the common law courts of Westminster Hall have undertaken, by the exercise of a sound discretion, to prevent the abuse of this right of appeal by refusing to stay execution where it can be shewn, that the writ of error had, in truth, been brought for the express purpose of vexation and delay.(*e*) The abuse of this right of appeal still, however, continues to be so great an evil in England, that it has been recommended as proper to oblige the defendant to bring the whole debt and costs recovered into court, as the only effectual means of preventing the practice, which too often prevails, of bringing writs of error for the mere purpose of delay.(*f*)

(*z*) 3 Hen. 7, c. 10; Tidd, Pra. 1131; Kilt. Rep. 228; Shepherd *v.* Mackreth, 2 H. Blac. 284.—(*a*) Tidd, Pra. 1074.—(*b*) 3 Jac. 1, c. 8; Tidd, Pra. 1075.—(*c*) 13 Car. 2, Stat. 2, c. 2, s. 10; Shepherd *v.* Mackreth, 2 H. Blac. 286, 3 Blac. Com. 410.—(*d*) 16 & 17 Car. 2, c. 8.; Tidd, Pra. 1081.—(*e*) Entwistle *v.* Shepherd, 2 T. R. 78; Christie *v.* Richardson, 3 T. R. 78; Pool *v.* Charnock, 3 T. R. 79; Kempland *v.* Macauley, 4 T. R. 436.—(*f*) Tidd, Pra. 1075, note.

When the appellant puts in bail in error, or gives security as required, notice thereof should be given to the opposite party; and, if he does not except, the bail is allowed; but, if he does except, then better bail must be justified in a manner similar to that of justifying special bail in an original action; and if the defendant fails to put in sufficient bail in error, the plaintiff may take out execution.(*g*)

In all the States of our Union, it is believed that some statutes have been passed to prevent the abuse of this right of appeal. In Virginia, with a view to leave the right as open and as large as possible, and yet to prevent a party from resorting to it with any hope of great delay; it was made the duty of the judges of the Court of Appeals to sit at least two hundred and fifty days, unless they should sooner despatch the business of the court.(*h*) And a statute of North Carolina has gone so far as to declare, that the party appealing shall give bond with surety to prosecute his appeal with effect; which bond shall be sent up as a part of the record; and, upon the judgment being affirmed, the appellate court may enter up judgment *instanter*, as well against the sureties as the principal in such bond for the amount recovered in the court below, with costs and twelve per cent. interest.(*i*)

In Maryland, the regulation of this right of appeal, with a view to prevent its abusive exercise, seems to have been the subject of early and repeated legislation,(*j*) prior to the passing of the existing law upon the subject,(*k*) by which all those English statutes in relation to the same matter, which had been adopted,(*l*) were virtually repealed so far as its provisions were, in any respect, incompatible with them. It would seem, that the English statute, which gave double costs on an affirmance of a judgment on a writ of error, had been adopted as a law of this State, although no instance may now be found in which such costs have been awarded;(*m*) and it is certain, that writs of enquiry, in actions of dower and ejectment, have been issued after an affirmance in error; and that judgments have been entered on such inquisitions, although such writs of enquiry may have now fallen into disuse.(*n*)

(*g*) Tidd, Pra. 1087.—(*h*) 2 Mun. Rep. Intro. 17.—(*i*) Yarborough *v.* Giles, 1 Hayw. 453; Kinchin *v.* Brickell, 2 Hayw. 49.—(*j*) 1642, ch. 6 & 34; 1678, ch. 8; 1692, ch. 9; 1695, ch. 19; 1699, ch. 10; 1704, ch. 32, and 1712, ch. 5.—(*k*) 1713, ch. 4.—(*l*) Kilt. Rep. 88, 92; 228, 239.—(*m*) Gale *v.* The Proprietary, 1 H. & J. 343, note. Kilt. Rep. 92.—(*n*) Joan *v.* Shields, 3 H. & McH. 7; Gore *v.* Worthington, 3 H. & McH. 96; Kilt. Rep. 239.

But in the practice under our acts of assembly, in relation to appeals, there is no evidence to be found of any course of proceeding, analogous to that of the English courts, of justifying bail in error.

It seems, that originally all decrees of the High Court of Chancery of England were final and conclusive. It not only appears, that no appeal from a decision of that court was allowed, prior to the year 1581; but, that the right of appeal, as then first introduced, remained entirely unsettled until about the year 1662, when the matter was taken up; and, after having been much opposed, zealously debated, and maturely considered, was finally settled and admitted to be as much a constitutional right to appeal from a decision of the Hight Court of Chancery, as from a court of common law.(*o*) But as, at common law, no writ of error will lie from a judgment by default or by consent; so in equity the decree or order appealed from must have been adverse, and not made by the express or tacit consent of the appellant: as when a party thinks proper not merely to decline opposition to measures which the court would enforce;(*p*) but, by himself or his counsel, consents to a decree or order, there lies no appeal from it, even although he gave no such authority to his solicitor; his remedy being against his counsel;(*q*) nor can any appeal be made generally available from a decree by default,(*r*) or, as it would seem, from a decree taking the bill *pro confesso*.(*s*)

The general rule of the common law, which postpones the exercise of the right of appeal until after the final judgment of the original court, is founded in sound sense; and, as is evident, should be as closely followed as practicable in allowing appeals from the Court of Chancery. Therefore, it has been held, that no appeal can be allowed in equity, but from a final decree; or from an order grounded on some disputed facts disclosed in the bill and answer involving the merits of the controversy; and which order, if executed, would subject the party to some irreparable

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(*o*) Gilb. For. Rom. 190; 1 Harr. Pra. Chan. 676; 2 Mad. Cha. 573; 2 Lond. Jurist. 107.—(*p*) Wood *v.* Griffith, 19 Ves. 550, 1 Meriv. 35.—(*q*) Downing *v.* Cage, 1 Eq. Ca. Abr. 165; Buck *v.* Fawcett, 3 P. Will. 242; Harrison *v.* Rumsey, 2 Ves. 488. Bradish *v.* Gee, Amb. 229; Beresford *v.* Adair, 2 Cox. 156.—(*r*) Cunyingham *v.* Cunyingham, Amb. 89; Stubbs *v.* ——, 10 Ves. 30; Charman *v.* Charman, 16 Ves. 115.—(*s*) Davis *v.* Davis, 2 Atk. 24; Maynard *v.* Pomfret, 3 Atk. 468; Carew *v.* Johnson, 2 Scho. & Lefr. 300; Jopling *v.* Stuart, 4 Ves. 619; Geary *v.* Sheridan, 8 Ves. 192; Ogilvie *v.* Herne, 13 Ves. 563; Heyn *v.* Heyn, Jac. Rep. 49.

grievance;(*t*) or from an order involving the merits, and which order could not be followed out without, in effect, depriving the party of the benefit of an appeal, or rendering any appeal thereafter, for correcting the error of such order, entirely nugatory;(*u*) yet it is perfectly manifest, from the very nature of the jurisdiction of the Court of Chancery, that the exercise of its various and flexible powers, which have been expressly so contrived as to afford relief in peculiar cases, and under emergencies which admit of no delay, where no just estimate, in anticipation, can be made of the periled rights of the party, so as to have a satisfaction secured to him, by bond with surety, in the event of a loss; or where no adequate relief can be obtained otherwise than by a prompt exercise of the conservative powers of the court, an order may be called for, in the outset, or in the progress of a suit, the execution of which, if suspended on giving bond or otherwise, would be, in effect, to declare, that the court should exercise no such power. And, besides, if the progress of a suit in chancery might be delayed, by an appeal from any of the various interlocutory orders which the circumstances of the case might require, the suit itself, by such interruptions, by abatements, by loss of testimony, or other accidents, might never be brought to a final hearing; or the final decision might not be until after the subject in controversy itself had perished, or been entirely wasted.

Hence it is obvious, that there are many orders in chancery from which no appeal ever has been, or ought to be allowed. Such as an order to shew cause why any particular thing should not be done; or an order for an attachment to bring a party before the court; or an *ex parte* order refusing an injunction; or an order granting an injunction until the coming in of the answer; or then, on motion, dissolving it;(*w*) or continuing it until the final hearing, or further order; or, where property was likely to be lost, or materially injured, an order appointing a receiver to take care of it for the benefit of all concerned;(*x*) or an order upon a defendant to bring a sum of money into court, which he had admitted, in his answer, did not belong to him, for the purpose of having it invested so as to be made productive pending the litigation;(*y*) or a mere discretionary decree or order, as

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(*t*) Blount's Case, 1 Atk. 295; Head *v.* Harris, 2 Scho. & Lefr. 563; Roche *v.* Morgell, 2 Scho. & Lefr. 724; Buel *v.* Street, 9 John. Rep. 447; Snowden *v.* Dorsey, 6 H. & J. 114.—(*u*) Waldo *v.* Caley, 16 Ves. 214; Wood *v.* Milner, 1 Jac. & Wal. 616. (*w*) Since altered by 1832, ch. 197.—(*x*) Altered by 1830, ch. 185, s. 1.—(*y*) Altered by 1830, ch. 185, s. 1; Thompson *v.* McKim, 6 H. & J. 327, contra.

for costs; and the like. To allow a party, on giving bond, or upon any other condition, to appeal from such orders as these, so as thereby to suspend their execution, would be a scandalous abuse of the right of appeal;(*z*) it would be to palsy the arm of justice;(*a*) and to make a chancery suit the greatest judicial nuisance that could well be imagined;(*b*) or, as has been justly observed, by sustaining appeals to such an extent, the court of the last resort would draw into it the whole business of the Court of Chancery, before it had become ripe for discussion and decision there; and not only render the voice of that court mute, and its process nugatory, but it would destroy the appellate court itself, by rendering it wholly incompetent to despatch the immensity of business which would be drawn into it.(*c*)

But as the record of a chancery suit contains all the proofs, as well as all the allegations at large, of the litigants, with a recital, previous to the exhibits read, of the substance and scope of the pleadings, tending to the points in controversy upon which the decree is made, drawn up, as directed by the rule and practice, in the most concise manner, by the register, under the inspection of the solicitors of the parties, of what was alleged, relied on and proved at the hearing, as being parcel of, and as shewing the foundation upon which the court had rested its final decree; the whole of which, by an appeal, is removed to the court above;(*d*) therefore, in order to prevent the appellant from making a fraudulent, or abusive use of his right of appeal, by laying back, at the final hearing in chancery, for the purpose of taking his opponent by surprise in the appellate court, by insisting on testimony not previously relied upon; or by taking exceptions, or *making points* not taken or made in the court below, it has been laid down, in general, that no evidence can be read and relied on in the appellate court, which was not read and relied on in the court of chancery;(*e*) that no exceptions can be taken, or *point made*, by way of appeal, which had not been taken or made in the court below;(*f*) that

(*z*) Way *v.* Foy, 18 Ves. 453.—(*a*) Huguenin *v.* Baseley, 15 Ves. 183.—(*b*) The Warden of St. Paul's *v.* Morris, 9 Ves. 318.—(*c*) Buel *v.* Street, 9 John. Rep. 448; 2 Mun. Rep. Intro. Judge Tucker's letter, 17; Debates Virg. Conv. of 1829, page 760; The Warden of St. Paul's *v.* Morris, 9 Ves. 316; Cowper *v.* Scott, 1 Eden, 17; Wirdman *v.* Kent, 1 Brow. C. C. 140; Jenour *v.* Jenour, 10 Ves. 572.—(*d*) Gilb. For. Rom. 162, 184, 190; Pra. Reg. 127; 1 Harr. Pra. Chan. 77, 620; 2 Harr. Pra. Chan. 664; White *v.* White, 4 Ves. 35; 2 Fow. Exch. Pra. 164; Broad *v.* Broad, 2 Cha. Ca. 161; Gifford *v.* Hart, 1 Scho. & Lefr. 396; Carew *v.* Johnston, 2 Scho. & Lefr. 308; (*e*) Cunyngham *v.* Cunyngham, Amb. 90; Button *v.* Price, Pre. Cha. 212; Keen *v.* Stuckely, Gilb. Rep. 155; Wood *v.* Griffith, 19 Ves. 550.—(*f*) Chamley *v.* Dunsany, 2 Scho. & Lefr. 712.

no new matter, not in issue in the court below, can be insisted on in the court above;(*g*) and that no account which was not asked for at the hearing below, can be made the ground of appeal.(*h*)

Whence it appears, although in equity as well as at common law, the parties, after framing their allegations to suit the peculiar nature of their case, are allowed sufficient time and means to bring in all their proofs; and are then permitted to take any exceptions, and to make any points they may think proper, that yet they are not suffered, by an appeal, to cast their case into a new shape; or to give it a new, or different aspect in any respect whatever; since the sole object of an appeal, in all cases, whether at law, or in equity, is not to allow the appellant to present a different, or a better case; but merely to enable the appellate court to correct such errors as it may appear the inferior court had fallen into, upon a review of the identical case upon which the court below had decided, and nothing more.

No statutory provisions have been made in England for the purpose of regulating the right of appeal from the Court of Chancery, or for preventing its abuse; and therefore the matter has been hitherto entirely governed by such rules as have been laid down by the original and appellate tribunals themselves, upon due consideration of the peculiar nature of the subject.(*i*) It is admitted, that very grave reasons should be required to induce the court to refuse the benefit of appeal;(*j*) and that any interference with the right of appeal is a delicate subject, to be applied with jealousy.(*k*) Nevertheless, as it would be attended with consequences most oppressive, to suitors in equity, if an appeal were allowed, of itself, to operate as a stay of proceedings, it has long been the established practice of the Court of Chancery to consider an appeal as, in no case, having the effect of suspending its proceedings, unless an order for that purpose is made by the court itself; or unless, in special cases, the appellate court should interpose by a special order.(*l*) And, even if the decree were absolute and final, yet, if it were of such a nature, that the consequence of suspending its execution would, in effect, be, if the party in whose favour it had been made should die before the appeal could be heard, a reversal of the decree without any judgment of the court, the proceedings would not be stayed.(*m*) The Court of Chancery appears to have

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(*g*) Thompson *v.* Waller, Pre. Chan. 295.—(*h*) Chamley *v.* Dunsany, 2 Scho. & Lefr. 712.—(*i*) 2 Fow. Exch. Pra. 202.—(*j*) Wood *v.* Griffith, 19 Ves. 551.—(*k*) Way *v.* Foy, 18 Ves. 454.—(*l*) Waldo *v.* Caley, 16 Ves. 213.—(*m*) Waldo *v.* Caley, 16 Ves. 214; Wood *v.* Milner, 1 Jac. & Wal. 616.

been governed, in this respect, by a sound discretion upon a consideration of the peculiar nature of each case; so that, in fact, the hearing of a petition, to stay its own proceedings, pending an appeal, is, in some sort, a summary rehearing of the case itself.(*n*)

Upon all such occasions, however, the court gives a certain degree of credit to its own decree, supposing it to be right, unless strong ground is shewn for a contrary conclusion, more than the mere dissatisfaction of the party appealing. And, in order to induce the court to regard the case as reasonably doubtful, at least two counsel, who the court will not presume to act so unworthily as to state what they do not know and believe, must certify, that, in their opinion, there is just cause for appealing.(*o*) It must appear, that the application for an appeal has not been unreasonably delayed;(*p*) and, although an appeal may be taken from a decree to account, yet the court will proceed to have the account taken pending the appeal.(*q*) In granting a stay of its proceedings, the Court of Chancery, generally, imposes such terms, by ordering the sum decreed to be paid into court, and so invested as to be productive pending the appeal, or by appointing a receiver, or by requiring such security, as will afford to the party in whose favour the decree has been made a reasonable assurance, that there shall be no unjust delay in prosecuting the appeal, or any material loss, or irreparable injury sustained by a suspension of the proceedings.(*r*)

In England, the rules prescribing the extent of the right of appeal from the inferior Courts of Admiralty, and the regulations by which its exercise is prevented from being abused, are nearly similar to those by which the right of appeal is limited, and its exercise restrained from decrees of the High Court of Chancery.(*s*) Here, however, in the federal courts, no appeal is allowed in any case of admiralty and maritime jurisdiction, but from the *final* decree, or sentence of the court;(*t*) and, if such *final* decree be not appealed from, no appeal lies from any subsequent proceeding upon the summary judgment rendered on a bond for the appraised value, or upon an admiralty stipulation taken in the case to enforce the decree;

(*n*) Willan *v.* Willan, 16 Ves. 217; Monkhouse *v.* The Corporation of Bedford, 17 Ves. 380; Wood *v.* Griffith, 19 Ves. 551.—(*o*) Huguenin *v.* Basely, 15 Ves. 183. (*p*) Savage *v.* Foster, 9 Mod. 38; Gwynn *v.* Lethbridge, 14 Ves. 585.—(*q*) Popham *v.* Bampfield, 1 Vern. 344; Nerot *v.* Burnard, 2 Russ. 56.—(*r*) Willan *v.* Willan, 16 Ves. 216; Monkhouse *v.* The Corp. of Bedford, 17 Ves. 380; Way *v.* Foy, 18 Ves. 452; Huguenin *v.* Basely, 15 Ves. 180.—(*s*) Clarke's Praxis, tit. 54 & 55.—(*t*) Act. Cong. 24th Sept. 1789, ch. 20, s. 21 & 22.

the proceedings in such cases, and the awarding of execution being considered incidents exclusively belonging to the court in possession of the principal case.(*u*) So too in the federal courts there can be no appeal in a chancery suit, but from the *final* decree.(*w*) A decree for the sale of mortgaged property has been deemed a final decree within the meaning of the act of Congress;(*x*) but it has been held, that an order overruling a plea of the statute of limitations, and directing the defendant to answer;(*y*) or an order dissolving or refusing to dissolve an injunction, is not a decree from which an appeal will lie.(*z*) It is believed, that in all the States of our Union, in which distinct Courts of Chancery exist, or in which any of their inferior and original tribunals have been invested with the powers of a Court of Chancery, the range of the right of appeal has been more or less limited; and that some regulations have been adopted with a view to prevent the abuse of its exercise.(*a*) In North Carolina all original jurisdiction in equity, beyond a small amount, was given exclusively to the Superior Courts of Law and Equity, which were, at one time, courts of last resort, and, of course, there could be no appeal in equity from any of their decisions.(*b*)

In Maryland, although it appears, that the Court of Chancery was one of the earliest of the judicial establishments of the Province, yet there is nothing which shews, that an appeal was ever allowed from any of its decrees, until it was expressly provided for by the legislature. The act for regulating writs of error and granting appeals from and to the courts of common law;(*c*) is, as its title indicates, like all the previous acts upon the same subject, expressly confined, in all its provisions, to cases at common law; and has been followed out by a practice, in some particulars, different from that of the English courts in like cases.(*d*) The existing act of assembly, which allows of appeals from Chancery, seems to have been a re-enactment of a law which had been passed a few years before;(*e*) it enacts, that it shall be lawful for any person who conceives himself "aggrieved by any decree of the Chancery Court, to have an appeal to the governor and council," the then court of appeals.(*f*) It is not said, that the right of appeal shall be

(*u*) The Hollen & Cargo, 1 Mason, 431.—(*w*) Act Cong. 24th Sept. 1789, ch. 20, s. 22.—(*x*) Ray *v.* Law, 3 Cran. 179.—(*y*) Rutherford *v.* Fisher, 4 Dal. 22.—(*z*) Young *v.* Grundy, 6 Cran. 51; Gibbons *v.* Ogden, 6 Wheat. 448.—(*a*) 7 John. Cha. Ca. Gen. Index, 22; Hening & Munford's Rep.; 4 Desau. Rep.—(*b*) Haywood's Rep. (*c*) 1713, ch. 4.—(*d*) The State *v.* Buchanan, 5 H. & J. 331.—(*e*) 1718, ch. 10; 1720, ch. 20.—(*f*) 1721, ch. 14, s. 3.

extended to any order, decision, or decretal order, but simply to "any decree of the Chancery Court;" whence, it would seem, that the right of appeal might have been, and, there is some reason to believe, actually was construed, under that law, to extend only to *final* decrees.(*g*) But it is well known, that the Court of Chancery of Maryland had, from the very outset, and always, governed itself according to the principles and rules of its prototype, the Court of Chancery of England;(*h*) and that the right of appeal was not confined to mere *final* decrees, seems to have been admitted and affirmed by one of the most important and best considered acts of assembly, in relation to matters of equity; in which it is said,

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(*g*) SLYE *v.* LLEWELLIN, *May*, 1721.—On motion of Mr. Daniel Dulaney, of counsel for the defendant, it is ordered, that the Injunction in this cause be dissolved; and that there go an order to the Sheriff to repossess Mr. Richard Llewellin, the defendant, with the lands in the bill mentioned, pursuant to a former order of this Court, made May, 1719; and that the bill be retained; and ordered hearing next court. Whereupon Mr. William Cuming, of counsel for the complainant, moves for an appeal from this order to the High Court of Appeals, the Injunction being dissolved, and a writ of possession ordered. Which appeal is denied by his Honor the Chancellor, the cause being not yet determined.—Chan. Proc. lib. P. L. 595.

(*h*) COWELL *v.* SEYBREY.—Mr. Moorecroft, attorney for the plaintiff, moves against the defendant for a commitment against him to the Sheriff of Saint Mary's county, until he do pay his contempt, and put in a perfect answer to the complainant's bill, there being an attachment issued against him for want of an appearance. Mr. Rozier, attorney for the defendant, puts in a demurrer to the plaintiff's bill. Mr. Moorecroft prays the judgment of the Court upon the said demurrer; and further moved, that the defendant was summoned to answer, and ought not to put in a demurrer.

2*d June*, 1669, CALVERT, *Chancellor*.—The defendant, upon serving of a *subpœna* to appear and answer, may put in a plea, answer, or demurrer; and the same shall stand good as if he had put in an answer, according to the practice of the Chancery Court in England, the rules of which court, as to that particular, were read. Whereupon it is ordered, that the said demurrer be set down to be argued upon Friday next, of which all parties concerned are hereby to take notice

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In this cause, the Court caused the late Sheriff of Talbot county, to whom it was alleged the said attachment was directed, to return his writ; he doth not appear, nor had he returned that writ to the new Sheriff, being present in court.

It was thereupon ordered, that the respective Sheriffs of the respective counties within this Province, do, by themselves, or their deputies, or attorneys, attend every court held here at Saint Mary's, for the Chancery and Provincial Courts, to answer to the said Courts for the return of writs to them directed, as they will answer the contrary to the said Courts at their perils.—(1785, ch. 72, s. 23.)

Ordered likewise, that the said defendant Seybrey do pay unto the plaintiff, or his attorney, twelve shillings and sixpence for his costs upon the contempt of setting an attachment; that he be committed to the custody of the Sheriff of Saint Mary's till he pay the same. The defendant said he had no money; but Mr. Rozier, his attorney, engaging, in open court, to pay the same, the said commitment is discharged.—Chan. Proc. lib. C. D. 5; 5 Franklin's Works, 355; Digges' Lessee *v.* Beale, 1 H. & McH. 71.

"that all appeals from the *decisions*, *orders*, and *decrees* of the Chancery Court, in cases where appeals properly lie," shall be made within nine months, &c.;(*i*) which declaration, it was afterwards enacted, should "be *confined* to decretal orders."(*j*) Whence it may be fairly inferred, that although the range of the right of appeal might have been, under the previous laws, construed to be, at least, coextensive with the right of appeal from the Court of Chancery of England, yet by this last law it was intended to reduce it within much narrower limits, by declaring, that it should "be *confined* to decretal orders."

Consequently, although it may be questionable, in many cases, whether an appeal, which would be allowed in England, should be granted here, yet it would seem to be perfectly clear, that where an appeal will not lie from the English Court of Chancery, it cannot now be granted from this court.(*k*) Hence, as it is settled in England, that there can, in general, be no effectual appeal from a decree by default; or from a decree, to the passing of which the party has assented; or which, by his negligence or omission, he has permitted to go against him, it would seem necessarily to follow, that no appeal ought to be allowed to a party against whom any such decree had been passed by this court, either in the ordinary course, or according to the special provisions of the act of assembly, which authorizes the court to proceed *ex parte*;(*l*) or under any of the acts which authorize the court to take the bill, *pro confesso*, as against an absent, or a contumacious resident defendant; since the right of appeal has been reserved to such a party by no act of assembly, in any case whatever; and if he were, notwithstanding, to be suffered to appeal, such a decree would be thereby rendered, in a great measure, utterly futile; and he might thus be enabled to turn his own negligence to his particular benefit, by taking advantage of errors and omissions in the proceedings, which must have been waived, or might have been cured, or provided for, had he appeared and answered. But this is a matter which yet remains to be carefully considered and finally determined by the proper tribunal.

The act for regulating the granting of appeals from and to the courts of common law, declares, that the method and rule of the prosecution of appeals shall be in the manner and form as therein expressed, that is to say, the party appealing shall procure a tran-

(*i*) 1785, ch. 72, s. 27.—(*j*) 1818, ch. 193, s. 1.—(*k*) But see 1830, ch. 185, and 1832, ch. 197.—(*l*) 1820, ch. 161, s. 1.

script of the full proceedings of the court whence such appeal shall be made under the hand of the clerk of the said court and seal thereof, and shall cause the same to be transmitted to the court before whom such appeal is to be heard; and also in the same court file, in writing, according to the rule of the same court, such causes, or reasons, as he had for making the appeal; upon which transcript the Court, to whom the appeal shall be made, shall proceed to give judgment.(*m*) After which the legislature further declared, "that appeals from the Court of Chancery to the Court of Appeals, shall be subject to the same regulation and limitation, as to the prosecution of them, as appeals from the courts of common law are.(*n*) But there is no act of assembly which directs, that the execution of a decree in chancery shall, in any case, be stayed on the appellant's giving bond, with sureties, for the prosecution of his appeal, or which, in any manner whatever, prescribes the terms upon which any appeal may be granted; or the conditions upon which the execution of any decree of the Court of Chancery shall be delayed until the appeal can be heard and determined. As to all such matters, therefore, this Court has always been, as it now is, governed by the analogous practice of our own courts, so far as it can be so considered, and by the rules and practice of the English Court of Chancery in like cases.(*o*)

There are some cases to be found among the proceedings of the Chancery Court, during the provincial government, in which it appears, that, here as in England, the decree has been introduced by a brief recital of the allegations and proofs in the case; but there are few instances of the kind to be met with since the revolution.(*p*) Nothing, however, has been more common than for the Chancellor himself to state the case and to give his opinion, in writing, upon it as introductory to his decree. But neither of these modes of proceeding can be, or indeed ever have been regarded by the appellate court as sufficiently showing what were the exceptions *and points* in controversy before the court below. In the recital of the allegations and proofs it could not but often happen, that much was stated which had not been at all controverted; and as the recital was made under the sanction of the Chancellor it

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(*m*) 1713, ch. 4, s. 4.—(*n*) 1729, ch. 3, s. 3.—(*o*) But see the act passed since 1826, ch. 200.—(*p*) The Proprietory *v.* Jenings, 1 H. & McH. 140; Sparrow *v.* Gassaway, 1733; Chan. Proc. lib. J. R.; No. 2, p. 405; O'Brien *v.* Connor, 2 Ball & Bea. 146; Gregory *v.* Molesworth, 3 Atk. 627; Ex parte The Earl of Ilchester, 7 Ves. 373.

followed, on the other hand, that much matter might have been put aside, or omitted, which one or other of the parties had deemed of great importance, and upon which he had earnestly relied.(*p*) The opinion of the Chancellor, it is also evident, should still less be relied on as to what were *the points* made before him; because, like all other judges, he expresses an opinion on such *points* only in the case as appears to him to be decisive; and passes over all others unnoticed; or, indeed, as sometimes, though rarely happens, he takes a view of the case which renders it wholly unnecessary to pay the least attention to any one of the *points* that have been made by either of the parties to the controversy.(*q*)

Yet it is all important to the due administration of justice, in all cases, that "the full proceedings of the court," appealed from, with an exact exhibition of the exceptions and *points* there taken and made, and nothing more, should be as amply and correctly spread out and presented before the revising and appellate court as they were before the court below. For it is perfectly manifest, that, as on the one hand, the case should not be taken in fragments, upon successive appeals, or with any additions;(*r*) so, on the other, the parties should not be permitted to deviate from or enlarge the ground occupied by them, in the court below, by taking any other exceptions, or making any *new points*. Because, in passing upon any such *new* matter the Court of Appeals cannot act, according to the terms of its constitution, merely as a tribunal for the revision and correction of errors; but must necessarily step beyond its legitimate orbit, and take upon itself the power of a court of original jurisdiction.(*s*) And by thus suffering itself, in any respect, to put forth a power, beyond its appropriate sphere, it must inevitably draw to itself much business not properly belonging to it; and often take the parties by surprise with exceptions and points which had never before been thought of; or which had been, until then, purposely concealed, in order to defeat a party of his just right as authenticated by the judgment of the court below; where all such new objections might have been readily removed, had they been then made, and the parties apprised of them at the proper stage of the controversy.(*t*)

(*p*) O'Brien *v.* Connor, 2 Ball & Bea. 154.—(*q*) Kelly *v.* Greenfield, 2 H. & McH. 141.—(*r*) 1819, ch. 144, s. 4; Canter *v.* The American & Ocean Insur. Com., 3 Peters, 318.—(*s*) Chambers *v.* Wilkins, 2 Litt. Rep. 146; Huling *v.* Fort, 2 Litt. Rep. 194. (*t*) Carroll *v.* Norwood, 4 H. & McH. 290; Mahoney *v.* Ashton, 4 H & McH. 323; Beekman *v.* Frost, 18 John. 558.

There is, however, nothing to be met with in the proceedings of this court going to show, that the Court of Appeals has, at any time, in chancery cases, rigidly confined itself to the exceptions and *points* made in the court below; and, perhaps, that court might find it difficult to do so, unless some written evidence of the exceptions taken and points made, in this court, were placed upon the record.—And therefore it might be well to have it enacted, by the legislature, as a general rule, in all cases of appeal from the Court of Chancery, that a party should not be allowed to take any exception, or make any point in the Court of Appeals, which he had not taken or made in writing and filed, before the hearing, in the Court of Chancery.(*u*)

It appears, that this Court has always exercised a discretionary power over the right of appeal, analogous to that exercised by the courts of common law and of chancery of England, so far as to prevent its abuse, in being taken frivolously, vexatiously, or for the mere purpose of delay, by refusing to grant an appeal from every order with which a party may be dissatisfied; or by refusing to stay the execution of the order or decree, but upon certain terms, or until the party had given bond with sufficient sureties, as required by the act of assembly in cases at common law, to prosecute his appeal with effect;(*w*) and it must also appear, that the

(*u*) Some partial provisions have been made in relation to this matter by the acts of 1825, ch. 117, s. 2; and 1832, ch. 302, s. 5.

(*w*) RAWLINGS *v.* STEWART.—This was a bill filed by a mortgagor against a mortgagee to redeem; and for an injunction to stay waste. The injunction was granted as prayed. Among the proofs is a deposition of a witness taken on the 10th of January, 1751, before the mayor of London under the act of 5 Geo. 2, c. 7. Upon all which the following decree was passed.

"And the said cause standing in court ready for hearing, a day was by this court appointed for hearing thereof, on which day, being the first day of June in the year seventeen hundred and eighty, the said cause coming on accordingly to be debated before the Chancellor of Maryland, in the presence of counsel learned on both sides, the substance of the complainant's bill, the answer of the defendant, the proofs and exhibits in the cause appearing to be to the effect herein recited and set forth; whereupon, and upon debate of the matter and hearing what could be alleged on both sides, the court doth think fit, and so order and decree; and accordingly it is this first day of June seventeen hundred and eighty, by the honorable Court of Chancery of Maryland, and the power and authority thereof, ordered, adjudged and decreed, that the said Jonathan Rawlings be let in to redeem the land and appurtenances so as aforesaid mortgaged by Aaron Rawlings to William Hunt, and by him conveyed and made over to the said George Stewart, as set forth in the bill of complaint aforesaid, he the said complainant paying and satisfying to the said George Stewart what shall appear to be really *bona fide*, and equitably due and owing for principal and interest upon the mortgage aforesaid. And that an account be taken of the principal and interest really, *bona fide* and equitably due and owing upon the said mortgage, dis-

appeal has been taken from the order or decree within the time limited by the act of Assembly.(*x*)

Where the order or decree, appealed from, simply requires the payment of a sum of money, and nothing more, the rule has been, as at law, to require an appeal bond in double the sum so directed to be paid, and costs.(*y*) But on an appeal from a decree to foreclose a mortgage of land; or for the sale of mortgaged land; or for the conveyance of land in specific performance of a contract, and the like, it would be unnecessary and improper to require a bond in double the amount of the mortgage debt; or in double the value of such an estate so bound; which, although subject to much injury, is yet in substance imperishable and immoveable; and therefore, in such cases, the practice has been to follow the course pursued at law, in the analogous cases of writs of error in dower and ejectment, and to require an appeal bond in such a sum as will cover the whole amount of the costs and of the mesne profits as well as damages by any waste committed pending the appeal, which the statute authorizes the party to have ascertained at law by a writ of inquiry, and to recover, in case the appellant should fail to sustain his appeal.(*z*) But where the plaintiff in equity seeks a

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tinctly ascertaining in the said account the credits, advancements, and disbursements of the said William Hunt made and given upon the security, and the payments, satisfactions, and remittances made in the lifetime of the said Aaron Rawlings, and since his decease, in discharge of the said mortgage. And the amount of the sales of the negroes, and other personal estate of the said Aaron Rawlings made after his death by the agent of the said William Hunt, and for his use; also the annual value of the rents and profits of the said mortgaged lands during the time the said lands were in the possession of the said William Hunt, and the annual value of the rents and profits thereof from the time of the defendant's possession of the said lands to the time of taking the said account; and of the repairs and lasting improvements made thereon by the said defendant; and also the waste and destruction, and the value thereof committed by the said defendant on the said mortgaged lands during the term of his possession aforesaid.—J. ROGERS, *Chancellor*."

The defendant prayed an appeal from this decree, which was granted accordingly; and he filed an appeal bond in the penalty of fifty thousand pounds current money, with two sureties. The bond recites, that it was given in conformity to the act of 1713, ch. 4. The Court of Appeals affirmed the decree. The record then proceeds thus: "and at October court, 1785, the honorable the Judges of the High Court of Appeals returned to this court the transcript aforesaid with their proceedings on the same, to wit: and now here, &c. to the end of the judgment of the Court of Appeals, &c. Chan. Proc. No. 2, from 1784 to 1786, page 62, 113, and Slye *v.* Llewellen, ante 18, note.

But this matter has been since otherwise finally settled, Thompson *v.* McKim, 6 H. & J. 330; 1830, ch. 185, s. 1.

(*x*) 1785, ch. 72, s. 27; 1819, ch. 144, s. 4; 1826, ch. 200, s. 14.—(*y*) Johnson *v.* Goldsborough, 1 H. & J. 499.—(*z*) Wharod *v.* Smart, 3 Burr. 1823; Thomas *v.* Goodtille, 4 Burr. 2501.

specific performance of a contract, or the benefit of the decree can only be had by the delivery, preservation, or sale of certain moveable and perishable property, then it is clear, that the penalty of the appeal bond should be for a sum at least double the value of such property as well as the costs, and any particular sum of money which such decree may also direct to be paid. There does not appear, however, to have been any rule laid down by which the value of such property is to be ascertained, for the purpose of fixing the penalty of the appeal bond. The extent of the original jurisdiction of the Federal Courts, as well as the extent of the right of appeal from them, has been limited by act of congress to cases where the matter in dispute exceeds the sum or *value* of a certain specified amount.(*a*) In regard to which it has been held, that where, from the nature of the action, as in detinue, replevin, ejectment, a writ of right, or admiralty proceeding *in rem* for a forfeiture, the property itself, and not a debt or damages, is the matter in dispute, the *value* may be ascertained by affidavits taken on reasonable notice to the adverse party, or his counsel;(*b*) and this it is evident, would be the proper course to pursue for the purpose of bringing before this Court the means of making a just estimate of the value of the property, in case its value should be disputed, in order to ascertain what should be the penalty of the appeal bond in appeals from orders or decrees in relation to subjects of this latter description.(*c*)

In England, bail in error is given by a recognizance acknowledged in the court below; and if the sufficiency of the bail is excepted to, the party is thus called on to justify, or put in better bail. According to the English course in Chancery, where a party is called upon to give an appeal bond, or to enter into a bond, or recognizance, for any other purpose, he is required to do so before a master, by whom the obligation must be authenticated, and the surety approved. In Maryland, the practice in Chancery is different, and although there are many cases, as well as those of appeals, in which a bond with approved surety is required to be given; yet there is no instance in which a bond has been, like a recognizance, required to be acknowledged or executed before the Chancellor, or any officer of the court; and I have met with but one instance in

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(*a*) Act Cong. 24 Sept. 1789, ch. 20, s. 22.—(*b*) Williamson *v.* Kincaid, 4 Dal. 20; Courze *v.* Stead, 4 Dal. 22; The United States *v.* The Brig Union, 4 Cran. 216; Cooke *v.* Woodrow, 5 Cran. 14; Rush *v.* Parker, 5 Cran. 287; Green *v.* Liter, 8 Cran. 229.
(*c*) Some provision upon this subject has been since made by the act of 1826, ch. 200.

which any evidence of the authenticity or proof of the execution of such a bond has been produced to the Chancellor.(*d*) Although in some cases certain office bonds have been required to be authenticated before some of the judges of the courts of common law; and to be thereupon recorded.(*e*) But in all cases in Chancery the authenticity of the obligation has been assumed, or admitted, and the approval of the Chancellor, which is so often spoken of, is confined; *first*, to the conformity of the instrument to the requisitions of the law, or of the order or decree, in pursuance of which it had been given; and in the next place, to the pecuniary sufficiency of the obligors. It is necessary, that the penalty of the bond should be double the whole amount recovered, or ordered to be paid, and costs; or in the amount specified by the Chancellor in those cases where it has been submitted to his discretion to fix the amount; and also, that the condition should correctly set forth the judgment, decree, or order appealed from, or the object of the bond; or that duty, the faithful performance of which is intended to be secured by it. If the bond be not correct in these particulars, it cannot operate as a *supersedeas*, or so as to stay the execution of the order or decree; and therefore on the fact being shown to the Chancellor the party will be permitted to proceed to obtain the benefit of his order or decree.(*f*)

The pecuniary sufficiency of the sureties offered is, however, in this respect, a matter of the first and greatest importance. For although the terms of the obligatory instrument may be, in every particular, exactly as required; yet, if the sureties be insufficient, or insolvent; or become so before the event happens which authorizes the party to have recourse to it for the purpose of obtaining the relief which it was intended to secure to him, it is, in point of fact, as if it had never been given, or as if it had been originally a mere nullity; and therefore, in all such cases sureties should be given who are not only then sufficient; but who are likely to be so when the contemplated event shall happen. Where money is

(*d*) Cox *v.* Bozman. In this case, the bill having been dismissed with costs, the plaintiff prayed an appeal which was granted; and he thereupon filed an appeal bond, at the foot of which is the following certificate: "Talbot County, *silicit*, 31st October, 1785, I certify, that the aforegoing appeal bond was executed, by the signing, sealing, and delivery of the same, by the persons thereto signing, in the presence of the subscriber, one of the justices of the peace for the county aforesaid, and in the presence of John Tibbel and John Dougherty the subscribing witnesses, John Bracco." Chan. Proc. No. 2, page 250.—(*e*) 1716, ch. 1, s. 3; 1789, ch. 26, s. 15; 1794, ch. 54, s. 8.—(*f*) Johnson *v.* Goldsborough, 1 H. & J. 499.

to be paid, or some duty is to be performed, within some short space of time, a continuance of the solvency of a surety may be much more confidently relied on than where the debt is to be paid, or the duty to be performed at some distant day. But in reckoning upon the probability of a surety's continuing to be solvent, during any given period, various other circumstances must be taken into consideration as well as the lapse of time; his continuing solvency may depend, in a great degree, upon the regular or irregular, certain or hazardous business in which he may be engaged; thus, an agriculturalist, of the same extent of sufficiency, is more likely to continue solvent for the same space of time than a merchant.(*g*) The continuing solvency of a surety may also, in some measure, depend upon the kind of property held by him, as being such as is ordinarily acquired with a view to a permanent holding; such as land for cultivation; or such as personal property procured for consumption, or for the purpose of barter or traffic, which is easily alienated.(*h*) Hence it is, that many of our legislative enactments have required freeholders, or "persons of visible and landed estates," to be given as sureties, where their solvency was required to endure for any length of time.(*i*) The continuing solvency of a surety may, likewise, in some degree, depend upon the state of society in the country. In England, and in most other countries of Europe, property is either not so free, or it does not, or cannot be made to change hands so easily and so frequently as in ours. That very bold spirit of active enterprize of our citizens which is, in a great degree, the result of our free institutions; and the unfettered rights of all property, render the continuance of the solvency of all persons, for any length of time, less certain here than elsewhere.

In Maryland, however, a practice has long prevailed, as to the mode of showing the sufficiency of appeal bonds, and other such securities, which the Chancellor has been in various ways authorized or called upon to demand and approve, by which all these considerations seem to have been disregarded or totally put aside. For although it was, on the 7th of March, 1793, laid down as a standing rule, that no officer of this court or his deputy should be admitted as a surety in any such bond; and also, by the rule of the 14th of November, 1801, that the sureties in such bonds should reside within the jurisdiction of the court; yet, in all other respects,

(*g*) 1 Ev. Poth. Obl. 390.—(*h*) 1 Ev. Poth. Obl. 390.—(*i*) 1715, ch. 46, s. 9; 1742, ch. 10; 1789, ch. 26, s. 15.

it has been deemed enough to lay before the Chancellor a bond regularly drawn, and which purports to be the authentic instrument of those whose signature it bears; and, if the pecuniary condition of the obligors be known to the Chancellor, he approves or disapproves of it accordingly; but, if the Chancellor has not himself a full knowledge of the situation of the obligors, then their sufficiency must be certified to him by some other judge, by a justice of the peace, or by one of the solicitors of the court; upon which the bond is at once approved without notice to the opposite party, or further inquiry of any sort;(*j*) for it has rarely, if ever, happened, that the approval has been opposed, as by exceptions to bail in error, or to special bail; and, if any such were taken, there does not appear to be any settled mode of proceeding, by which to cause the sureties to justify, to ascertain their sufficiency, or to have better sureties given, which would not be attended with much trouble and delay. Such certificates of sufficiency, it is certain, are, in many cases, too easily obtained; yet there appears to be no adequate mode of correcting the evil. The court might censure or punish one of its own solicitors who should carelessly or unworthily certify sureties to be sufficient who he knew were not so; but the Chancellor can exercise no such authority over a judge, or a justice of the peace; and yet the most of such certificates come from justices of the peace. The legislature may provide some mode of guarding against these evils;(*k*) but until they have done so, this court must, in general, follow the existing and long established practice. The court does not, however, mean to say, that such certificates are to be considered as, in all respects, final and conclusive evidence of the sufficiency of the sureties offered; on the contrary, exceptions may be taken and proofs read; and then, if the sureties offered, on a fair estimate of the whole, and on due consideration of all circumstances, appear to be insufficient, the bond will be rejected.(*l*)

From all that has been presented to the court, in the case under consideration, and on making a fair estimate of the pecuniary

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(*j*) McMULLEN *v.* BURRIS. A decree having been passed appointing a trustee to sell lands to pay debts, he filed his bond accordingly which was endorsed thus. "Wm. Pinkney is well acquainted with the circumstances of Mr. Thomas, and begs leave to inform the Chancellor, that the within bond is ample security for the performance of his trust." Upon which it was "approved A. C. Hanson, Chan. 8th October, 1792." Similar in Deale *v.* Stewart, 1794; Coale *v.* Garretson, 1795, &c. &c.—(*k*) Votes & Pro. Ho. Del. 4th February, 1825.—(*l*) Some provision has been since made in relation to this matter by 1826, ch. 200, s. 15.

ability of all the obligors in the bond, which the court is asked to approve, there appears to be an ample sufficiency to answer the amount of the decree should it be affirmed. This court cannot allow itself now to depart from the existing practice, or undertake to introduce any new rule in restraint of the right of appeal, which seems to have been always most liberally indulged. To sustain the objections, that have been urged upon the present occasion, would be, in effect, to put aside a practice which seems to have been long settled with the entire understanding and approbation of the whole community.

Whereupon it is Ordered, that the said petition be dismissed, with costs, and that the bond be approved.

HOYE *v.* PENN.

On a bill against A. & B. joint and several obligors, it was *held*, that the trustee, appointed by the decree to make sale of their real estate for the payment of the debt, should be directed to sell so much of the land held by A. in the first instance as would raise one half of the debt, and to sell so much of the land held by B. in the first instance as would raise the other half of the debt, so far as, in that way, it might be found practicable; but with power to raise the amount by a sale of the whole at a succeeding period, if it can be done; or in the first instance, if it should appear to be absolutely necessary to do so.

And where a sale had been made, as thus directed, of so much of the land of each as not only to pay the half of the debt, due from each; but to leave a surplus of the proceeds of sale to be returned to each; and afterwards the purchaser of the land of A. became wholly insolvent, and the land which had been so taken from A., on a resale, did not produce even a sufficiency to pay the one half of the debt for the satisfaction of which it had been first sold: it was *held*, that to the amount of the surplus, A. was to be considered as a creditor entitled to come in *pro rata*, with the plaintiff, in the distribution of the proceeds raised by the second sale; but, that neither the plaintiff, nor A., could have the deficiency of their respective claims made up to either of them out of the surplus arising from the sale of B.'s estate: the whole of which should be paid to him.

The mere forbearance to sue, without fraud or collusion, cannot affect the obligee's rights against the obligor or his surety.

A voluntary conveyance to children, the grantor being indebted at the time, is fraudulent against creditors, without any other evidence of a fraudulent intention.

There can be no final decree until all the defendants have answered, or the case is in a situation to have the bill taken *pro confesso* against those defendants who have not answered.

A party, against whom the bill had been taken *pro confesso*, asked leave to come in, for the purpose of taking an appeal, which was refused; he, nevertheless, appealed, and carried the record up; upon which the Court of Appeals affirmed the decree.

The defendants, as heirs or devisees of the deceased debtor, to pay whose debts the lands have been sold, may have their respective interests adjusted, so as to have the surplus of the proceeds of sale distributed among them as such.

The share or dividend awarded to a party may be paid to his solicitor, or to his attorney in fact, on a power of attorney properly authenticated.

This bill was filed, on the 10th of July 1802, by *Francis Deakins*, executor of *William Deakins*, and *Benjamin Stoddart*, against *Benny Penn*, *Roby Penn*, *Charles Penn*, junr., *William Penn*, *Betsy Penn*, *William G. Penn*, *Sarah Penn*, and *Caleb Penn*, grantees and heirs of the late *Charles Penn*, senr., and *Nathan Waters* and *Evan Gaither*. Before any of the defendants had answered, the plaintiff *Francis Deakins* died, and administration *de bonis non* was granted on the estate of the late *William Deakins* to *John Hoye;* and the defendants, *Charles Penn*, junr., and *William Penn*, died; and *Benny Penn* and *Roby Penn* removed out of the State. Upon which a bill of revivor was filed by *Hoye* and *Stoddart*, making *John Penn* and *Lucy Penn*, the infant heirs of the late *Charles Penn*, junr.; and *Ann Penn*, and *Greenbury Penn*, the infant heirs of the late *William Penn*, defendants; and praying for an order of publication against the absent defendants, which was passed accordingly. *Subpœnas* were issued on this bill, some of which, instead of being served by the sheriff, as is most usual, were served by disinterested persons who made affidavit of the fact; which, according to the course of the court, was held to be sufficient.

The bill states, that *Ignatius Pigman*, *Joseph W. Pigman*, *Charles Penn*, senr., and *Nathan Waters*, being indebted unto a certain *Edward Gwinn*, in the sum of £568 18*s.* 1*d.*, on the 21st of September 1788, gave their joint and several bond to *Gwinn* for that amount; that *Gwinn* brought separate suits and recovered judgments on the bond against *Charles Penn*, senr., and *Ignatius Pigman*, for the principal, with interest from the 21st of September 1792, and costs. Upon which *Charles Penn*, sen'r, brought a writ of error, and the plaintiff *Stoddart*, with the late *William Deakins*, became bound as sureties in a bond to prosecute the writ of error; that, the judgment having been affirmed, suits were severally brought against the plaintiff *Stoddart* and the executor of the late *William Deakins;* and, judgments having been obtained against them, they, on the 1st of May 1802, paid the whole debt, principal, interest, and costs, then amounting to £934 10*s.* 9¾*d.*; that the late *Charles Penn*, senr., had, in his lifetime, conveyed all his real estate, consisting of sundry parcels of land lying in Montgomery

county, to his children; that is to say, by a deed of the 22d of March 1792, he conveyed one parcel thereof to his three sons *Benny*, *Roby*, and *Zachius*, as joint tenants, of whom the two first are the survivors; and by another deed of the 7th of May 1792, he conveyed another parcel to his two sons *Charles* and *William* as joint tenants; and, by a third deed of the 24th July 1792, he conveyed the residue of his real estate to his children *Betsy Penn*, *William G. Penn*, *Sarah Penn*, and *Caleb Penn*, as joint tenants; that the defendant *Waters* had conveyed all his real estate, being a tract of land in Anne Arundel county, to his brother-in-law the defendant *Evan Gaither*, that those conveyances were made without any valuable consideration, in fraud of these plaintiffs, after they had given their bond to *Edward Gwinn;* and in fraud of other creditors; that *Ignatius Pigman* was not a resident of this State; and that *Charles Penn*, senr., was dead insolvent. Whereupon the plaintiffs prayed, that they might, by substitution, stand in the situation which *Edward Gwinn* would have been in; that the defendants might respectively pay and contribute in satisfaction of the money the plaintiffs have paid, such sums as might be proper; and, that the plaintiffs might have such other and further relief as was suited to the nature of their case.

The order warning the absent defendants to appear and answer was published as required. The defendants *Benny Penn*, *William G. Penn*, and *Elizabeth Penn*, put in their answers; and the infant defendants *John Penn*, *Lucy Penn*, *Ann Penn*, *Greenbury Penn*, and *Sarah Penn*, answered by their guardian; *Caleb Penn* died, and his interests survived. By consent of parties, commissions were issued, and testimony taken and returned. It was admitted, that the late *Charles Penn*, senr., had executed the bond as a surety of *Ignatius Pigman*, and it was agreed that the auditor should state an account of the sum due to the plaintiffs, subject to all exceptions. Pursuant to which agreement the auditor calculated the interest upon the amount of the judgments up to the 11th of July 1810, making an aggregate amount then due of £1394 0*s.* 5*d.*

1*st May*, 1811.—Kilty, *Chan.*—The Chancellor has considered the arguments of the counsel on each side in their notes in writing; and has examined the proceedings in the suit. Several grounds of defence are taken; first, that *Pigman* was in prosperous circumstances at the time he purchased the goods from *Gwinn*, and remained so more than seven years after. It does not appear how

this can affect the right of the complainants; unless some fraudulent delay or collusion was proved to the injury of *Penn*.

The bond to *Edward Gwinn* was dated the 21st of September 1788, but was not payable until the 21st of September 1792. And although it seems to be admitted, that *Pigman* was the principal, and the other obligors the sureties; yet they all appear as principals in the condition of the bond.

Suits were not brought on the bond until April 1795; but such forbearance is not unusual, and does not affect the right of the obligee. And the sureties, if they thought proper to pay off the bond, might have had it assigned to them, and have brought suit against the principal. The judgments, against *Pigman* and against *Charles Penn*, were obtained at October term, 1796, with a stay of execution till the 1st of January 1797. The judgment against *Pigman* was removed in February 1797, as appears by the record, although the writ of error bond is left blank as to the dates; and admitting, that this bond was executed by *Deakins* and *Stoddart* to oblige *Pigman*, there is nothing suspicious in the transaction; and it appears also, that a similar bond was executed, about the same time, by *Charles Penn*, with the same sureties. *Edward Gwinn* died before November 1798, at which time his administratrix had appeared, and the judgment was affirmed. There is nothing to shew, that she was disposed to favour *Pigman;* and it is presumed, that she would have recovered the money from him or *Charles Penn*, by execution, if in her power. But suits were brought against the executor of *Deakins* and against *Stoddart* on the appeal bonds, and judgments obtained thereon at May and October term 1801, against them as sureties for *Penn*, as well as for *Pigman*. The money was paid by them on the 1st of May 1802, and the judgment against *Pigman* only was assigned to them. This was the commencement of their claim against *Charles Penn* or his heir or representatives, and they filed the present bill in July 1802. It appears by the testimony of *Benjamin Ray*, that executions were issued against *Pigman*, and *Penn*, which were both served, so that there was no neglect on the part of *Gwinn* to pursue his legal remedy, supposing, that he was obliged so to do, which was not the case. If *Pigman* had been possessed of visible property, a resort to it would have been preferable to a suit on the writ of error bond. And as to *Penn* it is to be observed, that the conveyance of his lands in 1792, prevented their being taken on the judgment, and affirmance in 1796 and 1798, by which

the debt might have been satisfied, and the complainants relieved from their engagements.

It is also contended, that there was an intention to defraud at the time the conveyances were made. This point is not very clear on considering the time; which was in the year when the bond to *Gwinn* became due; and on adverting to the evidence of *Benjamin Ray*, and *George Ray*. But the Chancellor considers them as voluntary conveyances, which, though founded on a good and meritorious consideration as to his children, and grand children, were not *bona fide* as against creditors, but were a badge of fraud in legal contemplation; and so strong a one as not to require any further proof of the intention, the grant or being indebted at the time.

A third ground is, that the deeds were made to confirm gifts before made to the children, or in consequence of their being settled on the lands which their father had intended to give them. On this ground the Chancellor does not perceive, from the evidence, any acts or declarations, that would have obliged *Charles Penn*, the father, to make the conveyances; and even if he had gone so far as to make them, and had kept them in his own power, it would not have bound him.

The other ground, of the payment having been made to *Deakins*, is not supported by the testimony.

The Chancellor is, therefore, of opinion, that the complainants are entitled to relief against all the defendants; but the manner, and the proportion in which they ought to contribute, he has not considered; nor the specific manner of granting the relief; both which will be determined, on the counsel for the complainant preparing a decree.

Nathan Waters, and *Evan Gaither* were named as defendants in the bill. There are no answers by them, and it is not perceived how they are disposed of, although *Evan Gaither's will* is among the papers.

After which, the case was again brought before the court by the plaintiffs, who asked for instructions as to the form of the final decree.

18*th September*, 1811.—Kilty, *Chan.*—The Chancellor has again examined the papers in this suit. It appears that *Penn* and *Waters* were equally liable; whether as principals in the bond to *Gwinn*, or as sureties. Waters was not taken on the writ against him, but his property might have been made liable.

The appeal bond was given on account of *Pigman*, and a similar bond on account of *Penn;* but the payment was made on a judgment on the appeal for *Pigman*, and the relief is prayed on the ground of substitution for *Gwinn.*

The object of the bill was to affect the land conveyed by *Penn;* and also that conveyed by *Waters* to *Evan Gaither*, who was made a defendant. And the prayer was, that the aforesaid defendants might respectively pay, and contribute in satisfaction of the money paid by the complainants, such sums as might be proper.

The defendant, *Gaither*, is since dead, and has devised the land in question to the defendant, *Waters;* and his wife, *Susanna Waters*, the sister of *Gaither.* *Waters* has not appeared; and an attachment, renewed in April last, for his appearance, has been returned *non est.*

Before a decree can be made, some further proceeding is necessary. Either, that *Waters* should, on application for amendment, be struck out of the bill, if the complainant's counsel should think it safe and advisable to make such an application; or, that he should be compelled to appear; or the necessary orders be applied for, and passed for taking the bill, as against him, *pro confesso:* and also, that his wife, the other devisee, should be made a party in order to have her interest in the land affected. After which the decree should be for a sale of the interest of *Waters* and wife for half of the debt; and *Penn's* for the other half, in the first instance; but leaving each eventually liable for the whole.

On the 19th of September 1811, the plaintiffs filed a bill of revivor, in which they stated, that *Evan Gaither* was dead, and by his will had devised his interest in the property in dispute to *Nathan Waters* and *Susanna* his wife; against whom the plaintiffs prayed relief, a *subpœna*, &c.

24th March, 1812.—KILTY, *Chancellor.*—This case had been submitted on notes; but was considered by the Chancellor as not ready for decision for the reasons stated in his order of September 18th, 1811.

Since that time process has issued against *Nathan Waters* and *Susanna* his wife; and, such of the parties as appeared have been heard by their counsel at the present term.

The Chancellor finds no reason to change the opinions, which he had formed, and which were expressed by him in his order above referred to; and by his remarks in writing, dated the 1st of May, and the 18th of September 1811; and will proceed to decree accordingly.

Since the order of May 1st, 1811, a bill of revivor has been filed by the complainants, *Hoye* and *Stoddart*, against *Nathan Waters* and *Susanna* his wife, devisees of *Evan Gaither*, whose death is therein stated. The death of *Susanna* has since been suggested on the docket; but her interest is considered as surviving to *Nathan Waters;* and, against him there has been an attachment, with proclamations, which enables the Chancellor to take the bill *pro confesso* against him.

With respect to the sums due, the Chancellor is of opinion, that as there was no decree to account, but only an agreement of the parties to have the sum due stated; the sum of £459 9*s*. 7½*d*., charged as interest in the auditor's statement, ought not to be made principal as is usual in other cases.

It is thereupon *Decreed*, that the bill of the complainants, as against *Nathan Waters*, be taken *pro confesso*. It is further *decreed*, that the real estate, stated in the bill to have been conveyed by *Charles Penn*, sen'r, and *Nathan Waters*, by the deeds therein exhibited, be sold; or such part of each as may be necessary for the purposes hereinafter stated; that *John Brewer* of the city of Annapolis be and he is hereby appointed trustee to make sale thereof; and that the course and manner of his proceedings be as follows, to wit: he shall first give bond to the State of Maryland in the penal sum of 10,000 dollars with a surety or sureties to be approved by the Chancellor, conditioned for the faithful discharge of the trust reposed in him by this decree, or any other order or decree in the premises. He shall then proceed to give notice, by advertisement in such newspaper or papers as he may judge proper, for at least three successive weeks, of the manner and terms of sale; which shall be, that the purchaser or purchasers shall give bond with surety, to be approved by the trustee, for the payment of the purchase money, with interest from the day of sale, within twelve months therefrom. The trustee shall then proceed, according to the notice, to make sale of the lands aforesaid at public vendue; or of so much thereof as will raise the sum of £934 10*s*. 9½*d*. current money, with interest thereon from the 1st day of May 1802, until paid, and the costs of this suit, and the amount of the commission as far as the same can be estimated. And in determining on the quantity of each part, to be first sold, the trustee shall sell the land held by the heirs of *Penn*, in the first instance, to raise one half of the debt, costs, and commission; and shall sell the land devised to *Nathan Waters*, in the first instance, to raise the other half; as far

as this way may be found practicable; but, with power, according to the first part of this decree, to raise the amount by a sale of the whole at a succeeding period, if it can be done; or, in the first instance, if it should appear absolutely necessary; subject, however, to the ratification of this court. And the trustee shall return as soon as conveniently may be, a statement of his proceedings under this decree, with an affidavit of the truth thereof; and shall return the bond or bonds taken, and the money when received, to be applied according to the further order of the court. And on the ratification of the sales or any sale, and on the payment of the purchase money, and not before, the trustee shall convey to the purchaser or purchasers the lands so bought, free and clear from all claim of the defendants or any of them. And the trustee shall receive for his trouble such commission as the Chancellor shall consider him entitled to on a view of all the circumstances of the case. The sales to be on the premises respectively, unless any difficulties or inconveniences should occur to render such sales improper.

The defendant, *Nathan Waters*, by his petition, filed on the 13th of July 1812, stated, that he wished to appeal from the decree; and therefore prayed, that he might be admitted to appear so as to become a party for the purpose of prosecuting an appeal.

13*th July*, 1812.—Kilty, *Chancellor*.—The Chancellor has considered the within petition, and is of opinion, that the prayer thereof, to admit the petitioner to appear, ought not to be granted.

Nathan Waters nevertheless appealed, gave bond with sureties which was approved. And, at June term 1818, of the Court of Appeals, the decree was affirmed.

The trustee appointed to make the sale, reported, that he had, on the 23d of November 1818, with the consent of the possessors, sold the whole of the lands lying in Montgomery county which had been conveyed by the late *Charles Penn*, sen'r; and that the whole of the lands lying in Ann Arundel county which had been conveyed to the defendant *Nathan Waters*, he had sold to *James Ferrée*. The aggregate amount of sales being $10,711 50. The usual order giving notice, having been published, and no cause having been shewn to the contrary, these sales were, on the 26th of January 1819, absolutely ratified and confirmed.

The auditor on the 26th of February 1819 reported, that he had examined the proceedings, and from them had stated an account between the estates of *Charles Penn*, sen'r, deceased, and *Nathan Waters*, and the trustee, in which the proceeds of each estate were applied to the payment of one half of the complainant's claim and costs, and its proportion of the trustee's allowance for commission and expenses; and the balances respectively were made payable to the said *Nathan Waters*, and to those entitled to claim under the said *Charles Penn*, sen'r, deceased. The auditor further reported, that his impression was, that the surviving grantees of *Charles Penn*, sen'r, were entitled to the balance of his estate in proportion to the quantity of land held by each in virtue of his several deeds. But, it not appearing which of his two children, *Charles Penn*, jun'r, and *William Penn*, survived the other, he had not been able to make the distribution accordingly.

From this account, stated by the auditor, as of the 23d of November 1818, being the day of the sales, it appeared, that the amount of the sales of *Penn's* estate was $4211 50; that the amount of the sales of *Waters'* estate was $6500; and that the amount of the plaintiff's claim, with interest up to that time, was $4968 43; leaving a surplus of the proceeds of the sales, after deducting all commissions and costs, of $1306 4½, to be distributed among the grantees of *Charles Penn*, sen., deceased; and, the sum of $3515 6½, which was awarded to the defendant *Nathan Waters*.

6*th March*, 1819.—KILTY, *Chancellor*.—Ordered, that the above statement, as reported, be confirmed; and the proceeds applied accordingly; except the sum to be distributed among the grantees of *Charles Penn*, sen'r, which is reserved for further order. Interest to be paid on the commission, claim, and dividends, in proportion as it has been or may be received. After which, on the 25th of October 1819, the Chancellor again ordered upon this account, that the trustee, after retaining his commission and paying such costs above reported as may be still due to the officers, may deposit, to the credit of the estates, any sum in his hands, or to be received

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It having been shewn, that *Benny Penn* had assigned a part of the land he had purchased of the trustee, to *Lyde Griffith;* and that *William G. Penn* had assigned a part of that which he had purchased to *Caleb R. Penn*, and *Ann* his wife; it was, on the 7th of July 1820, ordered, that, on the purchase money being paid, the trustee convey according to those assignments.

The plaintiff, *John Hoye*, on the 1st of February 1821, filed his petition, on oath, in which he stated, that he had agreed with the plaintiff, *Stoddart*, that he, *Hoye*, should be at all the trouble and expense of prosecuting this suit; and also another suit against *Lloyd Beall*, in which these plaintiffs were jointly interested; and, that he, *Hoye*, should be remunerated for all his expenses; and, also be allowed for his trouble a reasonable commission upon whatever should be recovered; and, that he had accordingly prosecuted those suits; and had, for that purpose, expended in various ways the sum of $1154 40; that *Stoddart*, after the agreement with this petitioner, had assigned all his interest in those suits to *Charles Gassaway*, who had refused to contribute any thing towards the expense of prosecuting them; that *Gassaway* was dead, leaving *William Darne* and *Charles Gassaway* his executors; that *Stoddart* was dead intestate, and no administration had been granted on his estate; and, that the auditor, in the account reported by him, had awarded the amount claimed by the plaintiffs to them jointly, without making any division of it between them. Whereupon the petitioner prayed, that this his separate claim might be allowed out of the amount so awarded to the plaintiffs jointly, &c.

At the same time the executors of the late *Charles Gassaway*, filed their petition, claiming the one half of the amount of the proceeds which had been awarded to the plaintiffs, for their testator, who was the assignee of the plaintiff *Stoddart*.

3*d February*, 1821.—Kilty, *Chancellor*.—On considering the above petition, it is Ordered, that the auditor state the claim of the petitioner, (*Hoye*,) giving notice and taking evidence in the usual manner. The application of the proceeds under the order of March 1819, (as to the petitioner and *C. Gassaway's* executors,) to be suspended till further order. The order to be made on the above petition, (by *Gassaway's* executors,) will depend on the decision on the petition filed by *J. Hoye*.

In pursuance of this order, the auditor reported, on the 6th of February 1821, that the petitioners, *Hoye* and *Darne*, had appeared before him, and come to an agreement, according to which, he had made a dividend of the amount allowed to the plaintiffs, between them, awarding to *Hoye* the sum agreed upon; which report of the auditor was immediately confirmed.

The defendant *William G. Penn*, filed two petitions, in which he stated, that he was interested as a purchaser of a part of the lands

in Montgomery county; and also as one of the legal representatives of his late father, *Charles Penn*, sen'r; among whom it appeared, that there was a large surplus to be distributed. Whereupon he prayed, that the surplus might be distributed; and, that the share due to him might be deducted from the purchase money he had stipulated to pay, &c.

23*d January*, 1823.—JOHNSON, *Chancellor*.—I do not perceive by the proceedings, that the surplus ever has been divided. The auditor's report of the 26th of February 1819, makes a surplus of $1306 4½ to be distributed among the grantees of *Charles Penn*, sen'r, deceased; but, who they are, or what proportion each is entitled to receive, don't appear.

The exhibits filed with the petition of *William G. Penn* are too informal, and some of them want even the appearance of proof. An order, such as requested by the petitioner, don't appear, at present, proper to pass. But on application, an order may be obtained for the auditor to state who are entitled to the surplus and the proportion of each; and then, on the petitioner obtaining their receipts to the trustee, given in conformity with the act of 1816, ch. 134, the trustee will be directed to execute a deed. In the mean time, to prevent the petitioner, (who I presume is entitled to the whole surplus,) from being compelled to pay money to the trustee, that he may hereafter plainly appear entitled to, an order may pass directing the trustee to suspend collecting that sum, with the interest, until further order.

Ordered, that the auditor state an account in which he will designate who, and in what proportion, are entitled to the surplus money mentioned in his report of the 26th of February, 1819, and report the same. The report to be made from such evidence as is in the case; and from such as may be laid before him. As the petitioner's debt is suspended, and the time will not expire perhaps before the report of the auditor, it is thought premature to act on the latter part of the petition.

On the same day the auditor made a report, in which he says, that it appearing now by the deposition of *Adam Darby*, filed yesterday, that *William Penn* survived *Charles Penn*, jun'r, he had, in obedience to the order of to-day, and in conformity with his report of the 26th February, 1819, stated the within account with the trustee, for so much of the proceeds of the said estate, as by the account then reported, was reserved for distribution among

the grantees of the said *Charles Penn*, sen'r. The nett sum distributed, he had first apportioned to the lands conveyed by the deceased, and sold by the trustee, according to the sums raised by the several parcels; and then distributed each portion, among the surviving grantees of each parcel respectively; the deceased's deeds having made them joint tenants thereof. This report was, by an order of the 29th of January, 1823, confirmed, and the proceeds directed to be applied accordingly.

The trustee represented to the Chancellor, that *Benny Penn*, had now assigned the whole of the land which he had purchased, to *Lyde Griffith*, who was his surety in the bond, given to secure the payment of the purchase money; that the land having sold for more than the debt due, a portion of the surplus was to go to *Benny Penn*, which sum *Griffith* wished not to be compelled to pay to the trustee, or to bring into court. Whereupon the trustee prayed the direction of the court.

24*th April*, 1823.—Johnson, *Chancellor*.—On examining the assignment from *Benny Penn* to *Lyde Griffith*, dated the 7th July, 1820, I perceive, that *Griffith* is to pay the full purchase money and interest due thereon, before the trustee is to execute a deed. By the terms of the original decree, the trustee is restrained from giving a deed until the whole purchase money is paid; and therefore, without a special order to the contrary, must act accordingly. *Griffith* may have not only purchased the land from *Penn*, but at the time, it may have been agreed, that he was to have all the interest *Penn* had in the estate; if so, and *Penn*, and himself will join in an application, the sum due to *Penn* may, by an order, be placed to the credit of *Griffith;* and a deed directed on the trustees receiving the balance; otherwise, in the language of the assignment, he must pay the full purchase money and interest.

After which, *Benny Penn* again moved to obtain further instruction as to the distribution of the proceeds and the amount to be paid by *Griffith*, &c.

16*th June*, 1823.—Johnson, *Chancellor*.—Mr. *Benny Penn* will present this to the trustee, who is willing that Mr. *Griffith* should come to a settlement on payment of the purchase money, deducting the amount, according to the statement of the auditor, that is due to him. Let the trustee take Mr. *Penn's* receipt for the sum thus appearing due to him, and that amount Mr. *Griffith* can have deducted from the purchase money. *Roby Penn* appears, by the

report of the auditor, to be equally entitled to the sum of $511 14, stated in the report of the auditor, as the proportion of *Benny Penn* and *Roby;* and he, I am informed, is willing to make a deduction on account of his having before sold part of the land to *Fielder Parker; Roby Penn* is not in the State, but has left a person authorized to act for him. On the trustee's obtaining the receipt of the agent for the amount appearing due to *Roby*, that also can be passed to the credit of Mr. *Griffith;* and he and the agent can then settle between them. By this course, the trustee's proceedings in this Court will comport with his trust.

Roby Penn and *Betsy Penn*, then residents of the State of New York, gave a power of attorney to *Benjamin Willet*, authorizing him to receive their dividends; which power of attorney was executed before a magistrate of the county, in New York, where they resided; and further authenticated by a certificate, under the seal of the county, that the magistrate was properly commissioned as such at the time.

23*d June*, 1823.—JOHNSON, *Chancellor.*—Ordered, that the trustee be authorized to settle with the attorney *Willet.*(*a*)

James Ferrée, *Abraham Ferrée*, and *Basil Warfield*, with the trustee, filed their petition, in which they stated, that to secure the payment of the purchase money for the lands in Anne Arundel county, which had been sold to *James Ferrée*, he had given bond, with *Abraham Ferrée* and *Basil Warfield* as his sureties; that *James* had sold his interest in the land to *Abraham;* that the trustee, having brought suit and obtained judgment on the bond, had sued out a *fieri facias*, which, having been levied on the land, so sold to *James*, it had been accordingly advertised to be sold; that if sold by the sheriff for cash, it would not sell for more than one third

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(*a*) So in England, money has been directed to be paid to an attorney in fact, on a power made in Paris, and duly authenticated, 1 *Mad. Rep.* 227; and, in some cases there, it has also been ordered to be paid to the solicitor of the party entitled to it, without any special order from the party himself; 1 *Salk.* 157; *Doug.* 623; 1 *Blac.* 8; 1 *T. R.* 710; *Prec. Chan.* 209; *Jac. Rep.* 48. Here, on a person's producing a power, authenticated under the notarial seal of a notary public of Leghorn, attested by the consul of the United States, at that port, with a translation, the claim, amounting to $2373 77, was ordered to be paid to him as attorney in fact of the claimant.—*Taylor v. Casanave, MS. 12th November*, 1817. But it is usual to order payment of small sums on the written draft filed of a resident claimant, or that the money be paid to his solicitor in the case to any amount, because of all the parties being within reach and under the control of the Court.—*Henck v. Todhunter*, 7 *H. & J.* 275; *Munnikuyson v. Dorsett*, 2 *H. & G.* 374; *Branch v. Burnley*, 1 *Call.* 147.

of its value; and that a sale on terms would be more advantageous to all concerned. Whereupon these petitioners prayed, that the land might be decreed to be sold upon such terms as might be deemed proper, &c.

25th October, 1823.—Johnson, *Chan.*—It is not perceived, that there is any necessity for a decree on the subject of this application; but the trustee is authorized to suspend the sheriff's sale; he is the legal creditor, and has the control over the judgments, and can give such directions as shall appear most advisable, as the person who has the equitable title, the trustee, through whom the legal title must pass, believes it will be most advantageous for the property to be sold by the trustee, any sale they may make, not prejudicial to the interest of the complainants, will be confirmed. The trustee having made the sale, will report the same subject to the order of the Court; if convenient, he will consult the complainant interested as to the terms of sale.

On the 9th of June, 1824, the plaintiff, *Hoye*, and *William Darne* and *Charles Gassaway*, executors of the late *Charles Gassaway*, who was the assignee of the late *Benjamin Stoddart*, filed their petition, in which they stated, that the land which had belonged to *Nathan Waters ;* and which had been sold to *James Ferrée* for more than enough to pay one half of the debt due to the plaintiffs, having been ordered to be resold, because of the non payment of the purchase money by *Ferrée*, had been resold accordingly; but, that in consequence of the depreciation of land, and the scarcity of money, it had not, on the resale, sold for a sufficiency to discharge one half of the debt due to the plaintiffs; that the purchaser, *Ferrée*, and his sureties, were insolvent; that the trustee was about to pay the surplus of the proceeds arising from the sale of the estate of the late *Charles Penn*, sen'r, to his grantees and legal representatives; which surplus was liable to these petitioners to make up the deficiency due to them, resulting from the resale of *Waters'* estate, and the insolvency of the purchaser thereof, and his sureties.(*b*)

(*b*) The South Sea Company of England was created in the year 1710, under the sanction of a statute, (9 *Anne, c.* 21,) and had had its connexion with the government, from time to time, extended until the year 1719, when, by means of various misrepresentations and fraudulent practices, an act was passed, (6 *Geo. I., c.* 4,) declaring, that its capital stock should be increased, and its franchises new-modelled, by which it was almost immediately made the means of spreading abroad one of the most mischievous delusions that ever beset a civilized people. All ranks and classes were led to believe, that immense wealth was to be at once acquired by this South Sea

Whereupon the petitioners prayed, that the trustee might be prohibited from making any further payments to the grantees or heirs

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scheme. The value of all things was raised to a great height; but immediately that the bubble burst, property returned to its true value, and the stock of the company sunk almost to nothing. Multitudes were totally ruined; many became insane from their disappointments and losses, and the whole nation was plundered.—(*Smollet's His. Eng. b.* 2, *c.* 2, *s.* 26; *Shel. Lun. Intr.* 61.) As might have been expected, the administration of justice was not allowed to proceed in its regular course, altogether unaffected by this strange and pernicious infatuation. In many cases, where sales had been made under the authority of the Court of Chancery, purchasers were unable to comply with, or were ready to make the greatest sacrifices to disengage themselves from, their contracts. "A court of equity," said the Chancellor, in speaking of a sale made during this period, "ought to take notice under what a general delusion the nation was when this contract was made, when there was thought to be more money in the nation than there really was, which induced people to put imaginary values on estates."—(*Savile v. Savile*, 1 *P. Will.* 746; 2 *Eden*, 198.)

Causes somewhat similar, which were in operation at the time the sale and the resale mentioned in this case were made, were attended with similar effects. In a report made by the Secretary of the Treasury, it is, among other things, stated, that the whole amount of money, metallic and paper, in circulation within this Union, in the year 1815, might be safely calculated at not less than *one hundred and ten millions of dollars*, which was probably augmented in 1816; but at the close of the year 1819, it had been estimated, upon data believed to be substantially correct, at *forty-five millions of dollars*. According to these estimates, the currency of the United States had, in the space of three years, been reduced from $110,000,000 to $45,000,000; a reduction exceeding fifty-nine *per cent.* of the whole circulation of 1815. "A change so violent could not fail," says the Secretary, "under the most favourable auspices in other respects, to produce much distress, to check the ardor of enterprise, and seriously to affect the productive energies of the nation." And again, says the Secretary, "As there is no recorded example, in the history of nations, of a reduction of the currency so rapid, and so extensive; so but few examples have occurred of distress so general, and so severe, as that which has been exhibited in the United States."—(*Report of W. H. Crawford to the House of Represent.* 12*th February*, 1820, *pages* 8 & 9; *Niles' Reg.* 114.) It was found, at the close of the war of 1814, that the State Banks had inundated the country with their paper; and, instead of the evil having been corrected by the Bank of the United States, it is stated, upon good authority, that they increased it by their extensive discounts and issues to stockholders—(*Report Com. House Repr. to examine into the proceedings of the Bank*, 16*th Jan.* 1819, *page* 8,)—until, by the natural and wholesome influence of a renewed foreign commerce, and the curtailment of their discounts, the State Banks were enabled to resume specie payments, and the development of the peculations and frauds of those who had, at that time, obtained the management of the Bank of the United States, and the crippled and powerless condition of that institution, left all property free to return to its proper and real value.—(*Report Cond. Bank*, 49; *Letter* 2, *April*, 1819, *from Pres. Cheves to Secr. Crawford; North Amer. Review, January*, 1831, *art.* 2.) A recollection of these circumstances seemed to be necessary to a distinct understanding of the nature of the extraordinary depreciation spoken of in this case, and to shew how it happened, that, when this sale was made to *Ferrée*, in November, 1818, people had been induced "to put imaginary values on estates;" by which so many who purchased about that time were afterwards totally ruined. (*Chancellor's case, post, note* (*q*).

of the late *Charles Penn*, sen'r; and, that their claim might be first fully satisfied out of the surplus of the proceeds of the sale of *Penn's* estate.

9th June, 1824.—JOHNSON, *Chancellor*.—Ordered, that the trustee do not pay to the representatives of *Charles Penn*, or their orders, any further sums of money without the further order of the Court, or to any other person claiming to represent them, or to allow any other credits on account of any receipts the representatives may have or shall give; provided a copy of this order is served before the payment.

The trustee, on the 11th of June, 1824, reported, that under the authority of the order of the 25th of October, he had, on the 7th then instant, resold the tract containing 285 acres, of which *James Ferrée* had been the purchaser, for $10 50 per acre, amounting to $2992 50; which sale was absolutely ratified on the 14th of March, 1826.

The matter of the petition of *Hoye* and others, filed on the 9th of June, having been brought before the Court, the solicitors of the parties were fully heard.

28th February, 1825.—BLAND, *Chancellor*.—In this case, the lands of two debtors, *Waters* and *Penn*, have been sold under a decree of this Court, to pay the proportion due from each of a joint debt. The proceeds of the sales thus made, were reported to be more than sufficient to answer the whole demand. The securities for the purchase money were the lands themselves, and the purchasers with personal securities. The purchaser of *Waters'* land being, as is alleged, unable to pay, or insolvent; that land itself was again sent into the market; but owing to the general depreciation of such property, it has not sold for any thing like the original purchase money, or indeed a sufficiency to pay the proportion of the debt with which *Waters* was charged.

But, when the property was taken out of the hands of *Waters*, and sold, the parties tacitly conceded, and the Court solemnly adjudged, by confirming the trustee's report, and thereby divesting *Waters* of his real estate, and converting it, for the purposes of this suit, into personalty,(*a*) that a sufficiency of his property had been taken to pay the debt due from him. This debt, as to him, was then satisfied; for his property having been disposed of, by

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(*a*) The State use Rogers *v.* Krebs, 6 H. & J. 31.

the Court; and, being entirely under its control, he, the original debtor, cannot be held bound as an insurer of its sufficiency or safety, and liable for any loss that has happened to the fund which has been so taken into the custody of the Court. For, it is a general rule, that where a loss happens by the failure of a trustee appointed by creditors, they must bear it; but where a loss happens from the default of a receiver or trustee, appointed by the Court, or from any failure in the direction of the Court itself, the estate must bear it.(*b*) To seize any more of *Waters'* property, in such a case, would be to make him pay his debt over again.

It is said, however, that there is an unappropriated surplus of the proceeds of *Penn's* property in court; and that, *Penn* and *Waters* being jointly liable, that surplus may be applied to make good the ultimate deficiency in the proceeds of the sale of *Waters'* property. But, according to the decree of the 24th of March, 1812, which has been affirmed by the Court of Appeals, and is founded upon the clearest principles of law and equity, these two obligors, *Penn* and *Waters*, were held bound to contribute to the satisfaction of this debt in equal proportions, so far as such just contribution could be enforced without prejudice to their creditors.(*c*) And that contribution having been effected, by the sale of their respective estates, without delay or prejudice to these plaintiffs, was, as to *Penn* and *Waters* respectively, a complete satisfaction of the debt. Now, if it would be unjust, as we have seen it would be, to take any more of *Waters'* property to make good this deficiency, it cannot be at all equitable to take *Penn's* property for that purpose; since *Penn* and *Waters*, as to this debt, being jointly liable, are as one and the same debtor; and consequently *Penn's* property cannot be touched on any principle which would not, in like manner, authorize the taking of *Waters'* property.

The confirmed report of the trustee shews, that more than enough of *Waters'* property had been sold; and consequently he is a claimant to the amount of the surplus stated to have arisen from that sale; and is, in that respect, a creditor of the fund taken by the Court, who must be permitted to stand here upon as high ground as those creditors who brought him here as a defendant; and to satisfy whose claims the Court had taken this, his property. Therefore, if there should be any deficiency, in collecting the proceeds of the sale of the property of *Waters*, which has been resold, such loss must be

(*b*) Hutchinson *v.* Lord Massarene, 2 Ball & Bea. 49; The Rendsberg, 6 Rob. Adm Rep. 156.—(*c*) Herbert's case, 3 Co. 13; Wright *v.* Simpson, 6 Ves. 734.

borne *pro rata;* that is, by *Waters*, in proportion to his surplus, and by his creditors in proportion to their several established claims.

It has been laid down as a clear law, that when a sheriff seizes goods, by virtue of a *fieri facias*, to the value of the debt, the defendant is actually discharged, though they are not sold; for the plaintiff must depend upon his execution, and rely upon that; and he has no further remedy against the defendant, but altogether against the sheriff; and the defendant having lost his goods upon an execution, which the plaintiff himself has chosen, the goods are in the custody of the law, and the defendant discharged. Upon similar principles, it may be regarded as a general rule in equity, that where the property of a debtor has been sold, under a decree, to pay his debt, and the report of the trustee, as finally ratified, shews, that enough of the debtor's property has been taken and sold to satisfy such claim fully, the debt, as relates to the debtor, must be considered as satisfied; and no subsequent failure, from any cause whatever, in collecting the full amount of the proceeds of such sale, can justify the original creditor in again resorting to his debtor, and making a further seizure, after his property had been thus taken and sold to an amount equal to the debt.(*d*)

Whereupon it is ordered, that the several receipts or assignments of the respective representatives of the late *Charles Penn*, sen'r, be, and the same are hereby allowed in favour of the assignees claiming under them; and, that the trustee apply the proceeds as heretofore directed by the order of the 29th of January, 1823; and further, that the petition of *John Hoye* and others be, and the same is hereby dismissed, with costs.

From this order there was an appeal, and the order was reversed by the Court of Appeals, at June term, 1828.—*Hoye v. Penn*, 2 H. & G. 477.

(*d*) The King *v.* Hopper, 3 Price, 40; Wilbraham *v.* Snow, 2 Saund. 47, n. *l;* Clerk *v.* Withers, 2 Ld. Raym. 1072; S. C. 6 Mod. 299; Ex parte Minor, 11 Ves. 559; Beatty *v.* Chapline, 2 H. & J. 7.

HUGHES' CASE.

The form and mode of proceeding in Chancery, according to the act of Assembly, to obtain a division of an intestate's real estate among his heirs, where the lands lie in different counties.

Where an act of Assembly authorizes an object to be attained, and the prescribed course of attaining it is deficient, that of the forum resorted to may be pursued for the purpose of supplying such deficiency. If the deficiency cannot be so supplied, with propriety and effect, then the court applied to can have no jurisdiction; and if it cannot be supplied by any other court, then the act of Assembly must be treated as a nullity, because of there being no tribunal competent to execute it.

George A. Hughes and *Christopher Hughes*, by their petition, filed on the 11th of April, 1825, stated, that their father had died intestate, seized of lands lying in Baltimore and Anne Arundel counties, which had descended to the petitioners and his other children, who could not agree upon a division thereof; and that the intestate had left a widow. Whereupon they prayed, that commissioners might be appointed to make partition of the estate, &c.

11*th April*, 1825.—BLAND, *Chancellor*.—This is a petition founded on the act to direct descents,(*a*) which declares, that where the lands or estate lie in different counties the partition may be made in the mode, therein prescribed, by this court. It is the first case of the kind that has been instituted here.

It may be observed in general, that where an act of the General Assembly directs any thing to be done, the legislature either provides the means to be pursued to effect the object, or it is partially, or wholly silent as to the manner of proceeding. In the first case, the mode provided must necessarily be pursued; but, in the latter, the legislature acts in part, or altogether upon the supposition, that the enactment is, so far as it goes, or entirely, complete in itself; and, that the rules of the courts of common law, or of equity are sufficient to assure to the citizen any right which he may derive from it. If the prescribed means be such as can only be executed at common law, or in equity, then the one, or the other of those tribunals, must be clothed with exclusive jurisdiction accordingly; or the enactment may be such as to allow them to have concurrent jurisdiction. But, if its nature be such, that the prescribed mode can be executed by neither; or the right given be such, that, according to their several limited and settled modes of proceeding, neither of them can grant proper redress, they cannot, in any way, supply the deficiency. Because,

(*a*) 1820 ch. 191, s. 13.

even upon English authority, a court of justice cannot be permitted in any case to legislate;(*a*) and because, by the constitution of our Republic,(*b*) the three departments having been directed to be kept for ever separate, the judiciary has been expressly excluded from every species of legislation; and is precluded from supplying any omissions of the legislature, however obvious or necessary it may be for attaining the object in view. Hence, it clearly follows, that in all cases of this kind, even where the courts of common law and of equity have concurrent jurisdiction; the law and course of proceeding of the forum resorted to must be pursued.(*c*)

The act to direct descents gives to the several heirs of an intestate a right to have a partition of his estate made among them; and has, in part, prescribed the manner in which such partition may be obtained; and, consequently, so far this court must act according to the prescribed mode; but, in all other respects, it must be governed by its own established course of proceeding in so far as it can be modified, and adapted to the positive enactments of the legislature.

In all cases of this kind, as has been done in this instance, it is indispensably necessary, that the petition should state, with sufficient perspicuity, where or in what counties the lands, or estate of the intestate lie; the name of his widow, if she be then living; and the names and description of his heirs, whether adult or infant; and where resident, in or out of the State; to the end, that, if they be inhabitants of the State, notice may be given to them; or if not, that they may be warned by publication as allowed by the 50th section of the act. The commission awarded must, in all cases, exactly recite the petition for the government of the commissioners in their proceedings; and the court will expect, in every case, that the petitioner should, as in this instance, nominate to it some suitable, disinterested, and respectable persons as commissioners. The form of the commission to be issued in this, and all similar cases, shall be as follows.

"*The State of Maryland,*

"*To Joseph Townshend, Henry Stouffer, James Mosher, George Decker, and John Hillen, of Baltimore County, Greeting:*

"Whereas *George Augustus Hughes* and *Christopher Hughes*, by their petition to the Chancellor of Maryland, have set forth, that the late

(*a*) Weale *v.* West Middlesex Wa. Comp. 1 Jac. & Wal. 371; The Bank of Columbia *v.* Ross, 4 H. & M'H. 456.—(*b*) Decla. Rig. art. 6.—(*c*) 3 Blac. Com. 436.

Christopher Hughes, their father, died intestate and seized in fee simple of sundry parcels of land and real estate lying and being in Baltimore county and in Anne Arundel county, leaving a widow, *Peggy Hughes*, and six children; that is to say, the said petitioners, who are both of full age; and *Peggy*, who has intermarried with *Samuel Moore; Louisa Armistead*, who heretofore intermarried with *George Armistead*, since deceased; *Mary*, who has intermarried with *Horatio G. Armstrong;* and *Juliana*, who has intermarried with *Charles M. Thruston;* to whom the said real estate has descended. And the said petitioners allege, that the parties so entitled cannot agree upon a division thereof; they have therefore prayed, that partition of the said estate may be made among the aforesaid heirs according to their several just proportions, agreeably to the act of assembly in such case made and provided; which said prayer hath been granted: and it being suggested to the Chancellor, that you are discreet and sensible men within the said county; and the Chancellor having great confidence in your prudence and integrity, hath therefore assigned, commissioned, and appointed; and doth hereby assign, commission and appoint you, or a majority of you, having first taken the oath hereto annexed, to adjudge and determine whether the said estate will admit of being divided without loss or injury to all the parties entitled, and to ascertain the value of the said estate in lawful money, taking into consideration any incumbrances thereon; and to ascertain the value of the said estate subject to the incumbrances; and if the said estate can, in your opinion and judgment, or in the opinion and judgment of a majority of you, be divided without loss and injury to all the parties entitled, then to divide and make partition of the same fairly and equally in value, among all the parties interested, according to their several just proportions; or if the said estate cannot be divided equally and fairly among all the parties interested according to their several just proportions, then you, or a majority of you, shall divide the estate into as many parts as it is susceptible of, without loss and injury to all the parties entitled, and ascertain the value of each part of such estate in lawful money, subject to any incumbrance thereon; and if, in your opinion and judgment, or in the opinion and judgment of a majority of you, the said estate cannot be divided without loss or injury to all the parties, then you, or a majority of you, shall make return to our Court of Chancery of your judgment, and the reasons upon which the same was formed, and the real value of the said estate in lawful money, subject to the incumbrance if any thereon; and if you, or a majority of you, shall determine that the said estate can be divided in either of the ways herein before mentioned, without loss and injury to all parties, then you shall cause the lands to be surveyed and laid out by the county surveyor, or such other person as you may think qualified, for the several parties in case the estate consists of lands; and if the said estate shall be equally divided among

all the parties interested according to their several just proportions, then you, or a majority of you, shall allot to the several parties their respective shares of the said land: and in case the said estate shall consist of houses, you, or a majority of you, shall make allotment and partition among the parties. And you, or a majority of you, are hereby empowered and directed to ascertain and lay off the widow's dower in and to the lands and tenements of the estate, before you shall proceed to divide or value the same; and you, or a majority of you, shall make the ascertainment and location of such dower a part of your return to this commission. And you, or a majority of you, shall cause notice to be given to all parties concerned, by advertisement, set up at the court house, and in such other public places in the said counties as you may direct, at least thirty days previous to your proceeding to execute this commission. And you, or a majority of you, are appointed commissioners to proceed in the premises, according to the directions of an act of the General Assembly of Maryland, passed at December session 1820, chap. 191, entitled, "An act to reduce into one system the laws to direct descents." And you, or a majority of you, having made partition or allotment in manner aforesaid, shall make return of your proceedings to our Court of Chancery without delay. Witness the Honourable Theodorick Bland, Esquire, Chancellor, this 18th day of April, 1825."

"*Test*,—RAMSEY WATERS, *Reg. Cur. Can.*"

COMMISSIONERS' OATH.

Be it remembered, that on this —— day of —— personally appeared *Joseph Townshend*, &c. before the subscriber, one of the Justices of the Peace in and for Baltimore county, and made oath, [or affirmation,] that they would well and faithfully perform the duties required of them by the annexed commission, and all duties assigned them under the act of Assembly therein referred to; and that they would proceed in the execution and completion of the said commission without favour, partiality, or prejudice, and according to the best of their judgment and understanding.

The commissioners made a return of their proceedings and the partition which they had made in pursuance of this commission; and an agreement in writing, signed by each one of the heirs, praying that the return might be ratified and a final decree passed, having been filed, the case was submitted accordingly.

27*th July*, 1825.—BLAND, *Chancellor*.—This case standing ready for hearing, and having been submitted, the proceedings were read and considered.

Whereupon it is *decreed*, with the assent of the parties in writing filed, that the return of the commissioners and the

partition by them made be and the same is hereby ratified and confirmed.

And it is further *decreed*, with the assent aforesaid, that *Louisa Armistead* shall hold in severalty, and not jointly with the said heirs of the said *Christopher Hughes*, deceased, all those lots of ground which are contained in the grand division letter A, as described by the commissioners in their said return, and which is composed of the following lots, to wit: &c. &c. &c.

The costs of the suit to be borne by the heirs in equal parts.

DEAVER *v.* REYNOLDS.

Where a person, who had allowed himself to be reported by the trustee as the highest bidder, without any design to baffle the proceedings of the Court, stated, that he was unable to comply with the terms of the sale, he was discharged on payment of costs only, without having the property resold at his risk.

This bill was filed on the 29th July, 1824, by *James Deaver* and *Eliza* his wife, against *Lewis Reynolds*, *Allen Reynolds*, and others, the heirs of the late *Tobias Reynolds*, to obtain a partition among them of the real estate of which he had died seized. The defendants answered; and on the 30th of March 1825, a decree was passed, directing the estate to be sold for the purpose of effecting a division of its value, as it was incapable of a specific partition. The trustee reported, that he had made a sale as directed; and that *Lewis Reynolds* was the purchaser. Upon which an order was passed, that the sale should be ratified unless cause were shewn to the contrary on or before the 7th of July 1825.

After which the trustee reported, that the purchaser had neglected to give bond and comply with the terms of sale; upon which he submitted the matter to the consideration of the Chancellor. And at the same time *Lewis Reynolds*, the purchaser, by a note in writing, stated, that it was entirely out of his power to comply with the terms of the sale; and therefore prayed, that it might be set aside.

28*th July*, 1825.—Bland, *Chancellor*.—It is not alleged, nor is it shewn, that there has been any design to baffle the proceedings of the court, or to obtain any undue advantage by this bidder. He seems to have had a fair intention to purchase, but has either been

disappointed in his means, or has not had the ability to make the purchase, which he had calculated upon.(*a*) I shall not, therefore, order the estate to be resold at his risk, or charge him with interest on the amount of the purchase money as a penalty for the disappointment he has occasioned. Yet, as he has, by this abortive attempt to purchase, put the case to much expense, it is but just, that he alone should be charged with it.

Whereupon it is ordered, that the sale made to *Lewis Reynolds*, as reported by the trustee, be set aside; that the trustee proceed, without delay, to resell the estate as directed by the decree; that all the costs and expenses of this sale be paid by *Lewis Reynolds;* and that the auditor, in stating an account making a distribution of the proceeds of sale, deduct the same from the amount to which *Lewis Reynolds* may appear to be entitled.

LATIMER *v.* HANSON.

Where a bill has been filed for partition, creditors may come in on the ground of the insufficiency of the personal estate of the deceased debtor whose real estate is thus proposed to be divided.

A person appointed trustee is not obliged to accept the office; but if he does so, he is bound to obey the orders of the court.

The court may order the proceeds of a sale in the hands of a trustee to be invested by him, so as to be made productive pending the litigation; and if the trustee fails or refuses to make the investment accordingly, he may be ordered to bring in the whole amount, with compound interest, from the date of the order directing the investment.

The bill, filed on the 31st May 1816, states, that the late *Charles Wallace*, by his last will, devised his real and personal estate to *Leonard Sellman* and *Charles W. Hanson*, to be by them, after the payment of his debts and certain legacies, divided among the plaintiffs and defendants; that *Sellman* is dead; that *Hanson*, the surviving trustee, holds the property and refuses to execute the trust; and that a partition of the real estate cannot be made without loss. Whereupon they prayed a sale and division of the proceeds. No opposition having been made to this prayer, a decree was passed the 1st of March, 1817, directing the real estate to be sold, and appointing *Nicholas Brewer* trustee for that purpose, who made sale thereof accordingly.

(*a*) Hodder *v.* Ruffin, 1 Ves. & B. 544.

On the 9th of August 1819, *Sarah H. Smith* filed a petition in behalf of herself and the other creditors of the late *Charles Wallace*, stating, that in April 1810, she had obtained a judgment against him in his lifetime for £450 4*s*. 1*d*.; that she is informed that several judgments have been obtained against his executor, upon which executions have issued, which have been returned *nulla bona;* that she cannot obtain payment from the personalty; and therefore prays to be paid out of the proceeds of the sale of the real estate in the hands of the trustee; and that notice be given to the heirs, devisees, and creditors.

24*th July*, 1820.—Kilty, *Chancellor.*—On the petition of *Sarah H. Smith*, the auditor is directed to state an account of the claims against the estate of *Charles Wallace* if the proceedings are in a state for that purpose.

Immediately after which the case was again brought before the court for further consideration on the same petition.

29*th July*, 1820.—Kilty, *Chancellor.*—On the petition of *Sarah H. Smith*, claiming to be a creditor, and praying to be paid out of the proceeds of the said estate, on the ground, that the personal estate is insufficient, and that notice should be given to the heirs and devisees, and to the creditors; I have examined the proceedings, and find some difficulty in making the order at present. It has become the established practice to admit and determine on claims to the proceeds of sale on decrees for the purpose of dividing them; but this being done to remedy the neglect or delay of creditors who might have filed their original bill, it is incumbent on them to shew who are at present the heirs and devisees, their residence and ages, and to have order for publication against those out of the State.

On the 31st December 1821, some of the devisees filed their petition, in which they stated, that the trustee, *Brewer*, had made sale of the real estate, and had the money then in his hands; and stated further, that there are several disputes both at law and in equity, which have prevented a settlement of the personal estate of the said *Charles Wallace*, and it may remain for a long time doubtful whether the creditors or the representatives will be entitled to the proceeds of the said sales. In the mean time the debts are increased yearly by accruing interest, and the funds lie idle in the hands of the trustee. Part of the money arising from said sales

have now been upwards of three years in the trustee's hands. Upon which they prayed, that a trustee might be appointed to receive the money from *Nicholas Brewer*, and who might be directed to invest it in some public stocks, and the dividends thereof also to be invested.

31*st December*, 1821.—Johnson, *Chancellor*.—On the aforegoing petition, it is ordered, that the trustee, *Nicholas Brewer*, invest the money that he has, or shall receive in consequence of the sales made by him, in the stock of the Farmers Bank of Maryland, or in the stock of the Government of the United States, as he shall find most to the interest of those interested, and the dividends arising from such investment, in like manner to be invested. An annual report of the trustee is directed to be made to the court stating the amount invested, and the dividends arising therefrom, as well as the appropriations he shall have made of the dividends.

On the first of April, 1824, some of the devisees filed a petition, praying that the trustee might be ordered to account for stock purchased; or, if none had been purchased, that he might be charged with interest, and that another account might be stated making a distribution without charging him interest. Upon which it was ordered, that the accounts be stated by the auditor as prayed.

17*th March*, 1825.—Bland, *Chancellor*.—Ordered, that *Nicholas Brewer*, trustee, on or before the second day of April next, bring into court the money in his hands arising from the sales of property sold by him, and the securities which remain uncollected, as also interest from the 1st January 1822, on the amount acknowledged by his report to have been received, or shew cause to the contrary: provided a copy of this order be served on the said trustee on or before the twentieth instant.

The auditor, in his report of the 2d of July, 1825, says, "In obedience to the court's order of 24th July, 1820, he has made, of the claims exhibited against the estate of the said *Charles Wallace*, deceased, the statements marked A. A. as of the day of the trustee's last sales, and they amount, as appears for debts, to $8897 12, and for legacies to $2900 21. The claims for debts are not established as the act of '98, and the practice of the court require. Nor have such proceedings thereon been taken as to enable the Chancellor regularly to allow them, if they were sufficiently vouched. Yet, one of them (No. 1.) being a judgment against the deceased in his lifetime, and of course a lien on the estate, he thinks it should, at least, be entertained

until the right of the claimant shall, on notice, have been decided. In execution of the court's order passed upon the petition of *Wallace's* devisees, filed 1st April 1824, he has stated the trustee's account with the estate, marked B., applying the proceeds thereof to the payment of his allowances for commission and expenses, and of the costs in this court, and distributing the balance among the deceased's residuary devisees, assuming thus, that the personal estate is sufficient for the payment of debts and legacies, nothing being shewn to the contrary. And he has stated too, the trustee's account C. for so much of the proceeds as he has received; charging him therewith, and at his request, with the amount also of sales made to his son *N. Brewer, junr.* then crediting his said allowances for commission, &c. and the sum he paid into court on the 6th of April last; and so shewing a balance of $673 77 cents in his hands yet to be accounted for. At the foot of that account he has charged the trustee with interest also, from 1st January 1822, as directed; and this makes the balance in his hands to be $1393 22, bearing further interest from 6th April 1825.

On the 14th of July 1825, *Nicholas Brewer*, the trustee, filed his report, on oath, shewing cause in obedience to the order of the 17th of March 1825, in which report he says, "That by the decree, under which he acted, it became his duty to sell the property decreed to be sold, to take bond with sufficient sureties for the purchase money, to bring the bonds so taken, and the purchase money when received into court, or to apply it under the Chancellor's direction to those entitled to receive it, and he humbly conceives, that the Chancellor had no power to order him to invest the money when received and the accruing dividends compelling him to undergo labour and encounter risks not contemplated by his original appointment, nor intended to be compensated by his commission, nor does he believe, that the Chancellor had any power to order the investment of the proceeds of the sale of the real estate at all.

"Notwithstanding, the trustee further states, that in obedience to the said order he did endeavour to procure stock of the Farmers Bank of Maryland, but was not successful; and the stock of the Government of the United States was, at the date of the order, and ever since has been, above *par*, and would not have secured to the claimants six *per cent.* interest on their claims, which appeared to be the object of the petitioners. And the trustee, residing in Annapolis, could not have obtained it, even at the then value, without the employment of brokers, or other agents, at the expense of commission to them, and involving risk to himself by their possible infidelity.

"The trustee further represents, that he has made no interest from the funds in his hands, nor derived any pecuniary advantage from them, but has always been ready to bring them into court when required by the Chancellor to do so, and should have brought the whole into court under the Chancellor's order of the 17th March last, but that the auditor's statement, ascertaining the exact amount to be brought in, had not been made, and he is ready to bring in the residue.

"The trustee further states, that the only dispute, that he knows of, which rendered it doubtful whether the heirs or devisees of said *Wallace* or his creditors should receive the said funds, was a suit in this court by *Charles W. Hanson* executor of *Wallace*, against *John Murray*, executor of *John Muir*, to which the trustee refers, in which the auditor's report was made on the 4th of July 1821, and was understood to be acquiesced in, and the decree passed on the 23d of February 1824; and which case the trustee was in daily expectation of being decided a considerable time before; and he believes that was the suit which induced the petitioners to require the investment.

"The trustee further states, that not having succeeded in his endeavours to invest the said funds, and the petitioners and their counsel being acquainted with the progress of the said suit of *Hanson v. Murray*, and often attending the Chancery Court, and not having called upon him to report, he had every reason to believe, that they were satisfied, that the funds should remain as they were. The trustee further states, that even if he were chargeable with interest in this case it would be going a great length to charge him from the moment the order to invest was made, which the auditor, at the instance of the petitioner's solicitor, has done."

On the 18th of August 1825, *Sarah H. Smith*, with *James Smith* and *Edward T. Bond*, filed an amended petition, giving a more particular account of the nature of the claim and judgment mentioned in her petition of the 9th of August 1819, and stating that she had assigned it to the two other petitioners; that the personal estate of the late *Charles Wallace* was totally insufficient to pay his debts; and praying that their claim might be paid out of the proceeds of the sale of his real estate now in this court; and that notice might be given to the heirs, devisees, and legatees. To this petition *Charles W. Hanson*, one of the devisees, filed his answer, on the 17th of November 1825, in which he says, that he does not know of or admit the said judgment, or the correctness

thereof, or that the same is justly chargeable on the funds deposited in this court. And he also pleads, and relies upon, the act of limitations of 1715, ch. 23, s. 7, as a bar to the judgment.

29th August, 1825.—BLAND, *Chancellor*.—The trustee having made a further report on the 14th of July last, shewing cause in obedience to the order of the 17th of March last, the parties were heard by their counsel, and the proceedings and proofs in relation thereto were read and considered.

It is conceived there can be no doubt, that this court has the power to make such an order as that of the 31st December 1821; and, under the then circumstances of this case, its propriety was evident.(*a*) A person who is appointed a trustee by this court is not bound to accept the trust; or to continue in the office longer than he chooses; but, so long as he does consent to act in that capacity, he is bound implicitly to obey the orders of the court. In this case the trustee might have refused to take upon himself the risk, and trouble of executing the order of the 31st December 1821; but, if he thought proper to refuse, he was bound immediately to apprise the court of his determination, and to bring in those proceeds, then in his hands, which the court had told him should remain no longer idle, but be made productive in the manner pointed out; and, not having done so, he is clearly chargeable with interest.

Whereupon it is Ordered, that *Nicholas Brewer*, the said trustee, forthwith bring into this court the sum of $1393 22, as stated by the account marked C. as part of the auditor's report returned on the 6th of July last, together with interest on the said sum of money from the 6th day of April last.

Some time after which, the case was again brought before the court, by a motion of the solicitor of the representatives of the late *Charles Wallace*, the petition of *Sarah H. Smith*, and others, filed on the 18th August, 1825, having been dismissed.

30th March, 1826.—BLAND, *Chancellor*.—Ordered, that the auditor's statement of the 2d July, 1825, be ratified and confirmed; and that the trustee apply the proceeds accordingly, with a due proportion of interest, that has been or may be received, towards the payment of such of the said claims as may remain due and unpaid after the payment of the sum now in bank; for the payment of

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(*a*) Spring *v.* The South Caro. In. Comp. 6 Wheat. 519; 1 Harr. Pra. Chan. 256; 2 Fowl. Exch. Pra. 287.

which to the said claimant's solicitor, the register is hereby directed to draw a check.

The trustee, *Brewer*, appealed from the order of the 29th of August, 1825; and under the name of the case of *Nicholas Brewer, vs. Charles W. Hanson*, and others, on the 2d of July, 1828, the order was affirmed.

STRIKE'S CASE.

On a bill by a creditor, on its being shewn, that certain conveyances, by the debtor defendant to the other defendant, were executed for the purpose of defrauding the creditors of the debtor defendant, and without *bona fide* consideration; they were by decree declared to be void, as against the complainant, and the property ordered to be sold.

It was *held*, that, by such a decree, the plaintiff's claim must be taken to have been established; that the property directed to be sold was to be dealt with in that suit as if those annulled deeds had never existed; that the proceeds of sale must be brought into court; and that a reservation of "all equities as to the distribution of the proceeds of sale, are reserved by the court for hearing, on the trustee's report, on bringing into court the money or securities arising on the sale," cannot be so construed as to abnegate any matter which had been thus decided. But, it was *held* to be proper matter of further direction, under such a decree, in the *first* place, that the legal interest on the plaintiff's debt was to be computed and allowed; *secondly*, that an account was to be taken of the rents and profits of the property sold; *thirdly*, that the claim for meliorations and improvements was to be considered and determined; and *lastly*, where other creditors were permitted to come in, that their respective claims were to be adjusted, allowed, or rejected.

To what extent mesne profits may be recovered at common law, or in equity. A *bona fide* holder, without notice of any defect in his title, may be allowed for improvements; but a fraudulent holder, or a *mala fide* meddler, can have no such allowance made to him. The allowance for improvements, where it can be made, may be set off against the claim for rents and profits.

It is not necessary, that the bill should expressly state, that the suit has been instituted as well for the benefit of other creditors as of the plaintiff, to have it considered as a creditors' suit. It is enough, that the case is, in its nature, a creditors' suit. The mode in which other creditors are called, and allowed to come in; and the manner of authenticating their claims. Against such claims the statute of limitations may be relied on by any other creditor as well as by the plaintiff, or a defendant.

A creditor can in no case be suffered to split up his claim so as to multiply suits; nor can he, after the decree, be allowed to bring in any new and additional claim.

All objections to the testimony are open, and may be made at the final hearing.

Agreements between solicitors and suitors, relative to professional services, must be enforced like other contracts; and cannot be introduced into and settled as a part of the case.

No order or decree of a County Court can, after the case has been removed, be altered or reversed by the Court of Chancery.

This bill was filed, in Baltimore County Court, on the 25th day of February, 1817, by *William McDonald*, against *John Rogers* and

Nicholas Strike; and, on the 21st of May, 1819, the bill was so amended by consent, as to allow *Samuel McDonald* also to come in as a plaintiff; and, that the claim should be made as due to them as partners, under the firm of *McDonald & Son.*

It is stated in the bill, as thus amended, that the plaintiffs are and have been some time past partners in trade, under the firm of *McDonald & Son;* that, some time previous to the year 1811, a partnership had been formed and carried on, between the defendant *Rogers* and a certain *Robert Henderson*, under the firm of *Henderson & Rogers*, who as such contracted considerable debts; and, among others, that the firm of *Henderson & Rogers* became, and are now indebted to the plaintiffs, as the firm of *McDonald & Son*, to the amount of about six thousand dollars; that *Henderson & Rogers*, becoming embarrassed in their affairs, *Rogers*, for the purpose of preventing his private property from being made responsible for the debts of the firm, on the 16th of January, 1811, by two separate deeds of that date, assigned two lots of ground in the city of Baltimore, which he held as chattels real, subject to a ground rent, to the other defendant *Nicholas Strike.* These two deeds are exhibited as parts of the bill; the one is expressed to be in consideration of the sum of five hundred dollars for one of the lots; and, in the other, for the other lot, it is said to be in consideration of the sum of nineteen hundred dollars. In other respects, they are in the usual form of such instruments of assignment of leasehold property.

It is further stated and averred in the bill, that the plaintiffs have every reason to believe, that there was no *bona fide* sale of those lots from *Rogers* to *Strike;* that no consideration passed between them; that if *Strike* paid *Rogers* any money it was subsequently, and by way of loan on the security of those deeds; and they were understood by the parties to be expressly to avoid the payment of the creditors of *Rogers*, or of *Henderson & Rogers.* And, as evidence of this alleged fraud, the plaintiffs state, that a considerable part of the money paid by *Strike* to *Rogers*, was expended by *Strike* on one of the lots, after the execution of the deeds, and charged to *Rogers* as a part of the purchase money; that another portion of the pretended purchase money was expended by *Rogers* in erecting a furnace, and other permanent buildings on the other lot; that another part of the alleged purchase money was a sum paid by *Strike* to *Jacob Small*, long after the execution of those deeds, and even after the application of *Rogers* for the benefit of

the insolvent laws, and he, *Strike*, had been appointed the trustee of *Rogers;* that *Rogers*, during two years after the date of those deeds, continued to receive the rents, and to pay the ground-rents and taxes of those lots; that *Strike*, since the execution of the deeds, has often promised *Rogers* to reconvey the lots on the repayment of the money paid by him; and that, in October 1812, the defendant, *Rogers*, applied to Baltimore County Court for the benefit of the insolvent laws, on which occasion the parties procured the defendant, *Strike*, to be named as his trustee, the better to conceal those fraudulent assignments.

Upon which the bill prays, that those deeds of assignment may be declared null and void; that the lots may be sold for the benefit of the creditors of *Rogers*, and of *Henderson & Rogers;* that *Strike* may be compelled to account for the rents and profits of the lots from the date of the deeds; and that the plaintiffs may have a *subpœna* against *Rogers* and *Strike* to answer, &c. But there is no prayer for general relief.

This bill propounds as an interrogatory to be answered by the defendants, "whether, at the period of executing the said conveyances, the said *Henderson & Rogers* had not actually stopped payment as a commercial house; and whether certain property of theirs had not been seized by certain persons alleging themselves creditors?" But it is not alleged, that *Robert Henderson*, the partner of *Rogers*, was dead or insolvent; nor is it distinctly averred, that the partnership is actually insolvent; nor is *Henderson* made a party to this suit.

The defendant, *Nicholas Strike*, on the 29th of November 1817, put in his answer to this bill, in which he says, that he knows nothing of any debt being due from *Henderson & Rogers* to the plaintiffs; that the deeds of assignment were made by *Rogers* to him *bona fide;* the full consideration money, as set forth in them, having been paid by him to *Rogers;* and they were not executed to him to cover any loan of money due by *Henderson & Rogers*, or either of them; nor were those lots conveyed to him in trust, or by way of mortgage or security, or to evade the claims of the creditors of *Henderson & Rogers*, or of either of them; that *Henderson & Rogers*, or either of them, were not indebted to him previous to the execution of those deeds; that he purchased those lots absolutely, for his own use, and paid for them out of his own moneys; that after he made the purchase, he improved one of them, by erecting additional buildings thereon, at his own expense, for

which he never did charge *Rogers;* that after he had obtained possession of the lots, he leased one of them for a term of years; and the tenants, not *Rogers*, erected on it a furnace which is of no use to him, *Strike*, and which the tenants have a right to remove; that after he purchased, *Rogers* never received the rents, nor paid the ground rents and taxes with his, *Strike's*, consent; that he never promised *Rogers* to reconvey the property to him on his repaying the purchase money; that he paid the whole purchase money to *Rogers*, and never paid any part of it to *Jacob Small;* that *Rogers* continued to occupy one of the lots after the execution of the deeds; and on his failing to pay the rent, he, *Strike*, distrained his property for the rent in arrear, and thus obtained payment; and finally, that he was appointed trustee under the insolvent laws for *Rogers;* but never, as such, received any of his property.

Upon this answer the defendant, *Strike*, rested his defence; he never asked or obtained leave to put in any other answer; nor did he in fact ever put upon file any paper purporting to be a further answer to this bill.

On the 30th of March, 1818, the defendant, *John Rogers*, filed his answer, in which he states, that he entered into a partnership with *Robert Henderson* about the year 1807 or 1808, which continued until the year 1811, when they failed; that he owes the plaintiffs, after deducting a small payment made to them, nearly six thousand dollars; that a few days after the failure of the firm of *Henderson & Rogers*, he executed the deeds exhibited as parts of the bill, to *Strike*, in order to secure the property therein mentioned for the benefit of the creditors of *Henderson & Rogers*, and of his own creditors, so as to save it from those who were the creditors of *Henderson* before the partnership, and also in trust to preserve the surplus for himself and family; that this was the understanding and agreement between him and *Strike*, who did not pay, or agree to pay any part of the money which was the nominal consideration of those deeds; that those deeds were entirely voluntary, and were not intended to operate as a sale, or to become such in any event, but were merely to remain as a trust; for the property thus conveyed was worth at that time, much more than the consideration money expressed in the deeds, and he had been offered four thousand dollars for it by these plaintiffs; that at the time he executed those deeds, neither he, nor the firm of *Henderson & Rogers*, owed any thing to *Strike*, nor were those convey-

ances made in contemplation of future advances of money from *Strike*, although he afterwards received such advances from him: that in October 1812, he applied for the benefit of the insolvent laws, and obtained a release of his person, and *Strike* was appointed his trustee, as being already in possession of the principal part of his property, but he has not since applied for or obtained a final discharge; that he himself continued to occupy one of the lots, on which there was a good dwellinghouse, about eighteen months after the date of the deeds, without any agreement, or even suggestion, on the part of *Strike*, of his being under any obligation to pay rent for it; that the other lot, on which there was a small dwellinghouse, was rented, and he received the rent for his own use for more than eighteen months, after the date of the deeds, without any molestation from *Strike;* that he, this defendant, constantly paid the ground-rent, taxes, and all other dues, incident to the ownership of those lots, during his residence in one of them, and for a long time afterwards; that during that period he borrowed of *Strike*, from time to time, about seventeen hundred dollars, and laid it out in erecting a furnace on one of the lots which he carried on about two years and a half in conjunction with *McArdle & Coulson*, to whom *Strike* granted a lease of it for ten years, reserving rent; that by the persuasion of *Strike*, he gave up to him the lot on which he resided, and removed to another house nearer and more convenient to the furnace; that before he left his house, being much embarrassed in his affairs, on the persuasion of *Strike*, he consented to a colourable distress and sale of his effects for rent; but that he continued to hold possession of the property, which he used, and afterwards sold as his own, without any claim being made by *Strike;* that about eighteen months after *Strike* had taken possession of the lot so delivered to him, he made some improvements on it, an account of the expenses of which, as charged to this defendant, together with the sums advanced for erecting the furnace, and some other small sums, amounting to about three thousand dollars, *Strike* shewed to this defendant, and assured him, as he had often done on other occasions, that on the payment of the amount, the property should be reconveyed; that this defendant afterwards tendered to *Strike* the whole amount, so claimed by him, and demanded a reconveyance of the property; but *Strike* refused to comply. And finally, this defendant consents, that the property be sold and the proceeds applied, under the direc-

tion of the court, to the payment of his just debts, reserving the surplus to him and his family, &c.

The plaintiffs having put in a general replication to those answers, a commission was issued to Carlisle in Pennsylvania, under which the deposition of one witness was taken, returned, and filed on the 23d of March 1819. Another commission was issued to take testimony in the city of Baltimore, under which the depositions of thirty-six witnesses were taken; and among that number the deposition of the defendant *Rogers* was taken, under a special order of the court, subject to all just exceptions. This commission was closed on the 2d of April 1819; and soon after filed in court. Among the papers of this case there is a document marked as having been filed on the 15th April 1819, which is entitled in these words, "The answer of *Nicholas Strike*, of the city of Baltimore, to the *petition* of *William McDonald*, filed in Baltimore County Court against this defendant." There were sundry deeds and other documents filed by the parties, as evidence in the case. From the proofs, thus collected, it appears that the claims and allegations of the plaintiffs, as set forth in their bill, were substantially and sufficiently sustained.

28*th May*, 1822.—Dorsey, *Chief Judge*.—The said cause being ready for hearing, and having been fully argued by complainants and defendants, the bill, answers, exhibits, testimony, and all other proceedings, were by the court read and considered; and it being fully established to the satisfaction of the court, that *the deeds of the sixteenth January*, 1811, from the defendant *Rogers* to the defendant *Strike*, *mentioned in the said proceedings*, were executed for the *purpose of defrauding the creditors of Rogers*, and without *bona fide* consideration,—*Decreed*, that the said deeds be, and they are hereby declared null and void, as against the complainants in this cause.—*Decreed* also, that the property in said deeds contained be sold. That *Henry W. Rogers* and *Samuel Moale* be, and they are hereby appointed trustees for the purpose of making said sale, &c. And the trustees shall bring into this court, the money, or securities for money, arising from said sale or sales, to be applied under the court's direction, after deducting the costs of this suit, and such commission to the trustees as the court shall think proper to allow, in consideration of the skill, attention and fidelity, wherewith they shall appear to have discharged their trust. *All equities as to the distribution of the proceeds of sale, are reserved by the court for hear-*

ing, on the trustees' report, on bringing into court the money or securities arising on the sale.

Under this decree the trustees reported, that they had, on the 14th of September 1822, made a sale of the two lots, amounting to three thousand nine hundred and fifty dollars, which sale was finally ratified on the 10th of February 1823.

31*st May*, 1823.—WARD, *Associate Judge.*—Ordered, that this case be referred to the auditor of this court to be audited.

The solicitors of the plaintiffs, by their petition, stated, that the plaintiffs had agreed to allow them, as a compensation for their services, a commission of twenty *per cent.* on the sum recovered, deducting therefrom fifty dollars from each which had been paid to them; that they had so far conducted the cause successfully and with great care and labor; that the court had ordered notice to be given to the other creditors of *Rogers* to exhibit their claims here for settlement; and as the introduction of such other claims into this case might lead to some difficulty, they prayed the court to sanction the allowance of their claims, and to direct the auditor accordingly.

9*th January* 1824.—ARCHER, *Chief Judge.*—Ordered, that the auditor, in stating the account with the trustees, allow to *Henry W. Rogers* and *Henry M. Murray*, solicitors for complainants, the sum of $690 as complete fees for conduct of the case, subject to the usual exceptions.

It is stated, in the petition of the plaintiffs' solicitors, that the court had ordered notice to be given to the creditors of *Rogers* to exhibit their claims; but there is no such order to be found among the papers. Yet it must be presumed, that such an order was passed and notice given, since it appears, that several of the creditors of *Rogers* did actually bring in the vouchers of their claims. And it appears, that the proceedings and schedule on the application of *Rogers*, for the benefit of the insolvent law, had also been filed. From all which, and the proofs in the case, the auditor, on the 6th April 1824, made and reported a distribution of the proceeds of sale among thirteen of the creditors of *Rogers*, in which report the auditor says, that he had not noticed *Strike's* claims; because the whole of them appear to have proceeded from, and to have grown out of the first fraud between *Strike* and *Rogers*, and are not therefore entitled either to a preference or dividend.

The plaintiffs excepted to this report, 1st. Because there is no evidence sufficient in law to support the various claims stated in said account, except the complainants' claim, filed or exhibited in the cause. 2d. Because the said claims, or the greater part of them, have been paid and satisfied—your exceptants particularly charge that the following claims, reported by the auditor, have been fully satisfied, viz: &c. and others which the exceptants will be prepared to prove as this court may direct. 3d. Because the whole of said claims are barred by the act of limitations, which your exceptants plead and rely on in bar of said claims. 4th. Because from the laches and neglect of the several parties, named in said account and report as creditors, to prosecute their several claims, they are not entitled to the aid of this court, or to come in for a proportion of said funds; and have not applied to be let in for such distribution. 5th. Because said report and account are not in conformity with the evidence in the cause, or warranted by the principles of equity, and are in other respects erroneous.

The defendant, *Strike*, excepted to the report of the auditor. 1st. Because the auditor hath not stated the claim of the said *Strike* which is filed in the said cause, and the evidence which shows the veracity of the said claim sufficiently proved therein. 2d. Because the auditor in his report hath mistaken both the law and the fact relating to the said claim of the defendant *Nicholas Strike.*

31*st January*, 1825.—Ward, *Associate Judge.*—In this cause, upon motion of the complainants' solicitor, it is ordered and decreed, that it be referred to the auditor of this court, to state an account of the sums appearing due in this cause from the defendants, or either of them, to the plaintiffs; and also to take an account from the proofs in the cause, or such other proofs as may be required by him of the rents and profits of the several premises contained in the deeds of 16th January 1811, from the defendant *Rogers* to the defendant *Strike;* and also of the taxes and necessary repairs paid on the same by him; and also such further account as he may be directed to take by the said plaintiffs or defendants, and submit the same by report to this court, reserving further consideration, &c.

On the 17th May 1825, the auditor reported, that since his former report, the complainants had filed additional claims against *Rogers*, which were therewith stated. And the auditor further reports, that since the 13th February 1824, when he stated an account between the estate of *John Rogers* and *Henry W. Rogers* and

Samuel Moale, trustees of the said *John Rogers*, and made a statement of the claims against said *John Rogers*, (which said account and statement are filed in this court,) the complainants in this case have filed additional claims against said *Rogers*, which are herewith stated. And the auditor further reports, that the claims of *Hollingsworth & Worthington* and *Irvine & Beatty*, contained in the aforegoing statement, have been withdrawn; and that, except the schedule of *John Rogers*, there is no proof to establish any of the claims contained therein, but the claims of the complainants and of *Robert Taylor*. That the claim of the said *Taylor* is for a judgment rendered against *Robert Henderson*, the former partner of *Rogers*, at October term 1812, of *Baltimore* County Court, on a joint action with *Rogers*, which said judgment was revived against *Henderson* at March term 1821. The auditor further reports, that he has herewith made a statement of the rents received by *Strike*, and the sums expended in repairs done on the property in this cause mentioned, and in payment of taxes and ground-rents thereon, so far as he could collect the same from the papers in the cause. And further, that although he gave notice to the counsel of the complainants and defendants, to produce any further testimony which they might have, no additional testimony has been produced.

The plaintiffs excepted to this report, 1st. For, that the auditor hath stated the claims of *Strike*, one of the defendants, for materials, work, and repairs, made upon the dwellinghouse inhabited by him, which were done for his accommodation, and not to benefit the property.

2d. For that the said expenses and repairs, were incurred by *Strike* under deeds which have been decreed by this court to have been obtained by *Strike* from *Rogers*, in fraud of the *bona fide* creditors of the firm of *Henderson & Rogers*, of which *Rogers* was a partner, and without consideration.

3d. For that the said auditor hath not charged *Strike* with the difference between the prices bid by *Strike* at a public sale of the said property by the trustees, and the subsequent sale of the same, he having refused to comply with his purchases.

4th. That the said auditor hath reported the claims of *Strike* for repairs done to said property, although *Strike* has refused to produce the bills of the persons who did the repairs, and has relied upon the conjectures of said persons as to their probable value after a long lapse of time.

5th. These complainants further except to the claim hitherto audited in the first report in favor of the *Mechanics Bank of Balti-*

more, because, the same is barred by the statute of limitations, the said claimants having laid by, without making any demand, until these complainants, believing themselves the sole creditors, had by their own exertions, and at their sole and great expense, succeeded in setting aside the deeds in this cause mentioned, when they have first presented their demand.

6th. For that the said report and statement is erroneous and defective in point of law and fact; wherefore the said complainants beg leave to except to the same, and pray that the report and statement may not be confirmed by this court, but that the same may be remanded to the said auditor, or set aside and annulled.

The defendant, *Strike*, excepted to this report,—1st. For that the auditor hath not stated the entire claim of the said defendant *Strike*, and that said claim is not correctly stated from the evidence in the said cause.

2d. For that *Strike* claims the whole proceeds of the said sales of the said property mentioned in the said report, statement, and proceedings, in preference to all the other claimants in the said cause, and will contend that he is so entitled.

3d. For that the said report and statement is erroneous and defective in point of law and fact; wherefore, the said defendant, *Strike*, begs leave to except to the same, and that the said report and statement may not be confirmed by this court; but that the same may be remanded to the said auditor, or set aside and annulled.

After which the plaintiffs, by their petition, founded on the provisions of the act of 1824, ch. 196, prayed, that the case might be removed to the High Court of Chancery, upon which it was so ordered; and all the original proceedings were accordingly transmitted and filed here on the 15th day of June, 1825.

The case having been here brought to a hearing upon the exceptions to the several reports of the auditor, and for further directions; it was much and strongly insisted, on the part of the defendant, *Strike*, that under the concluding reservation of this decree, which was altogether a new and peculiar one, every matter was now open for discussion and adjudication, but the simple circumstance of the sale of the property; that this decree was entirely in the usual form, except the conclusion, which declares, that "all equities as to the distribution of the proceeds of sale are reserved by the court for hearing on the trustee's report, on bringing into court the money or securities arising on the sale." That by the addition of this peculiar clause, to be found in no similar

decree, it must have been the intention of the court to reserve all the rights and equities of the parties for its consideration and adjustment after the sale had been made.

10*th April*, 1826.—Bland, *Chancellor*.—This case has been very elaborately argued, and is now presented to the court for the purpose of being finally closed. It appears to have been warmly contested in every stage. It has been partly decided, but there yet remains much to be judicially considered and determined.

There is no principle, in relation to the administration of justice, which it is more important to preserve, or more necessary to adhere to, than that there must somewhere be an end to litigation. A matter which has been once solemnly decided, ought not, nor cannot be reheard and readjudicated; controversy must have an end, or society could have no peace. Errors of an inferior tribunal may be corrected by a superior; and even the same court, under certain circumstances, will correct its own mistakes by motion, petition, or bill of review. But no court of justice can allow itself to be engaged in the endless task of weaving and unweaving; of progressing to an adjudication, and then going back to readjudicate. Hence, whatever has been heretofore determined in this cause must now be considered as finally settled, and in every respect unalterable, except by bill of review, appeal, or in the regular course of law.(*a*) This does not seem to have been directly controverted in the argument; but the counsel differ widely as to the nature of the decree of May, 1822, and as to how far it extends over the matter of this suit; and some arguments have been urged which, if yielded to, might lead the court unwarily to trench upon the confines of that decree.

The first inquiry, therefore, is, how much of this case yet remains to be judicially passed upon. This case was originated on the equity side of *Baltimore* County Court, and has been removed into this court according to the act of assembly authorizing such removals. It stands here now as it would have stood had it continued there, or as if it had been begun and instituted here, and these proceedings are to be so considered. They have not been affected by any mere circumstance of place or tribunal, but are here as if they had all passed under, and been sanctioned by the judicial authority of the present Chancellor, and will be treated accordingly.

The complainants came into court as the creditors of *Henderson & Rogers*, of both and each of them. The plaintiffs complain,

(*a*) Attorney General *v.* Bowyer, 3 Ves. 725.

that their debt has not been paid; and they are here seeking payment. To enable this tribunal to give them the relief they ask; and which cannot be obtained without the aid of its peculiar powers; they point to certain property which, they allege, was once confessedly, and ought now, in reality, to be within their legal reach, and subject to the payment of their claim. They allege, that this property, which was at one time held by, and in the name of their debtor, *Rogers*, has been, and is now iniquitously covered up, and withdrawn from their grasp, by certain deeds of conveyance made by their debtor, *Rogers*, to a certain *Nicholas Strike;* they pray, that this cover, and these impediments, may be removed; that the property may be sold; that the rents and profits of it may be accounted for; and that the proceeds may be applied in satisfaction of their claim. These plaintiffs then call on *Rogers* and *Strike*, as defendants, to meet and repel these allegations, if they can.

Rogers appears, and admits, that he is the debtor of the plaintiffs, and that he conveyed the property in question to *Strike;* but denies that it was done with any fraudulent design; on the contrary he avers, that those conveyances to *Strike* were made by him in trust for, and the better to secure the payment of all his just debts. *Strike* comes in, and boldly takes his stand in direct and total opposition to the plaintiffs. He avers, and undertakes to maintain and prove, that he acquired the property in question for a full and valuable consideration, and that he has a right to claim protection here, as a fair and *bona fide* purchaser. He plants himself upon the honesty of his title, and claims nothing by his answer, which should not be conceded to a defendant who fully sustains such a defence as he has set forth.

In application to this claim and defence, proofs have been collected, and the case has been submitted to the decision of a competent tribunal, who, in May 1822, declared and decreed, that the conveyances from *Rogers* to *Strike* were "null and void as against the complainants;" that the property in question should be sold; that the proceeds be brought in "to be applied under the court's direction," and concluding with a declaration, that "all equities, as to the distribution of the proceeds of sale, are reserved by the court for hearing," on their being brought in.

It is held to be a first principle, by every court of justice, that no one can ask for its determination without showing a sufficient ground for its decision. Before a plaintiff can call for a determination in his favour, he must furnish the court with a basis whereon

to rest its judgment. In this case, the validity and sufficiency of the plaintiff's claim, are the very foundations of the decree; without that claim having been proved or admitted, no such decree ought, or could have been rightfully made. It does, therefore, necessarily and conclusively establish the plaintiff's claim; and consequently, that claim cannot now, in this stage of this cause, be again, in any manner, put in controversy. This is the first point settled by this decree.

The decree then proceeds to remove obstructions, and to grant facilities. The deeds, which are the impediments complained of, are declared to be null and void; or, in other words, as between the plaintiffs and defendants, they are totally annihilated. Whatever validity or operation they may be permitted to have, as between *Rogers* and *Strike*, they can have none at all, "as against the complainants." In relation to them, this property is to be dealt with as if those deeds had never existed. This is the second point settled by this decree.

But it would have come to a most lame and impotent conclusion had it stopped here; therefore, after having determined, that the plaintiffs had a claim, which ought to be satisfied; and, that they had a right to have recourse to this property, it goes on to declare, that the property shall be sold, and the proceeds brought in to be paid over as the court should direct. And this is the third point settled by this decree. So far, then, the matters in controversy between these parties have been finally closed; and this decree must be regarded, as all others of a similar nature have been, as a final decree; one in which all the material rights of the parties have been considered and adjudicated upon.

But the decree speaks of further directions, and of equities reserved; and it has omitted to say any thing of certain incidents to those rights which it had finally settled. As to all these particulars this decree yet remains to be fulfilled and executed. When a case, circumstanced like this, is brought before the court, it is spoken of as a case for further directions; and this phrase is used in reference to all cases, where, after the final decree, as in this instance, a further and eventual interposition of the court becomes necessary, to follow out and complete the equity, the substance of which has been established by the final decree. These further directions are spoken of in this decree, and in all similar decrees of this court, and of the *English* Court of Chancery; but in giving them, the court must act consistently with itself; and in

this instance, where the decree speaks of "the court's directions," and of all equities being reserved, its phraseology must be made compatible in all its parts. The reservation of all equities must not be used to fritter away, and to abnegate the substance of any matter, which had been, in a previous part of the decree, carefully and solemnly decided. No directions, therefore, will or can now be given, which are incompatible with the points settled by the decree. It is now brought before the court to be executed and completed, not in any manner to be revised or impaired.(*b*)

The decree of May, 1822, is founded upon the existence of a debt due to the plaintiffs; but it does not specify the exact amount, nor does it say any thing of the interest thereon. Interest, in equity, is held to be something more than a mere incident; it is the production, the fruit of the money due. In this case these creditors may now call for directions as to these particulars. An exact estimate of their claim could not, with propriety, have been made until after the sale of the property decreed to be liable for its payment; because, according to the course of the court in such cases as this, where the proceeds are insufficient to pay all, the interest is to be calculated only up to the day of sale. This, then, is the first point left open by this decree; but it is a matter which may be reduced to a certainty by the calculation of the auditor, to be made according to established principles, from the proofs in the cause; any further special directions in this instance, therefore, are deemed wholly unnecessary.

In this case, the bill expressly prays, that the defendants may be ordered to account for the rents and profits of the property in question. The decree has determined, that it was unlawfully detained, by declaring the deeds, under which it was held, null and void. It follows, therefore, as a consequence of this decision, that an account of the rents and profits should now be ordered, and that directions should be given, as to the time for which the account is to be taken, and as to the manner of taking it. This is the second point left open by this decree; and, as to which the Chancellor will now give directions.

The decree totally annuls the deeds under which *Strike* claims, without retaining them as a security for any thing. He can now, therefore, claim nothing whatever under them as against the complainants. But if, under all the circumstances of this case, apart

(*b*) The Santa Maria, 10 Wheat. 442.

from those deeds, and compatibly with the matters decided by the decree, he can show any equitable claim to an allowance for improvements he put upon the property in question, while it remained in his possession or under his control, the court may now give directions concerning such an allowance. This is the third point left open by the decree, and upon which the Chancellor will now decide.

This is one of those cases, in which one creditor is allowed to file a bill for the purpose of subjecting the property of his debtor to the payment of his own claim; and of all others, who may obtain permission to come in and participate in the burthens and the benefits. The other creditors are allowed to come in at any time, either before or after the decree; and it is most usual and proper, that the decree itself should command the trustee to give notice, at the time of advertising the property for sale, to all creditors to bring in their claims with the vouchers. This is the fourth point which has been left open in this, as in all other decrees of the kind. The further directions as to claims which may be thus brought in, comprehends every thing concerning them. As to all matters of this nature, so far as may be deemed necessary in this case, the Chancellor will now give directions.

It is said to be an established rule of the *Roman* law, and that of almost all modern nations, that the true proprietor shall not recover from the *bona fide* possessor, any rents and profits which have been consumed by him. But whatever fruits and profits, whether natural or industrial, such as trees standing or felled; grain growing, and the like, which remain upon the land at the time the true proprietor established his right, belong to him, and may be recovered from such possessor, as well as the land itself. Yet, as it would seem, if it can be ascertained, that the *bona fide* possessor was not merely maintained by the rents and profits; but was actually enriched by them, as by applying them to the payment of his debts, he will be held accountable to that amount to the rightful proprietor. But this general exemption is not granted to him, who, knowingly, keeps possession of another's estate, and therefore he is compellable to account for all the mesne profits he has derived from the land prior to its being recovered from him.(*c*)

According to the common law of *England*, the real owner may recover the rents and profits from the tenant, whether they remain

(*c*) Kames' Prin. Eq. b. 3, c. 1; Just. Inst. l. 2, tit. 1, s. 35.

upon the land or have been consumed by him or not; nor does the occupying tenant's knowing any thing of his adversary's title make any difference, as to the nature and extent of his liability for rents and profits. At common law, no damages were recovered in any real action; because, as it was said, until the right to the land was determined, the party could not be said to suffer any wrong. But it seems to have been considered as well established law, from a very remote period, that the right to maintain an action of trespass for the recovery of the mesne profits, followed as a clear and necessary consequence of the party's having established his right to the land itself. And it appears to be somewhat singular, that, during the period when real actions were much in use, the legislature should have deemed it necessary to interpose, for the purpose of allowing, by positive provision, the demandant, in many of them, to recover damages, or rents and profits; and yet, that those real actions, so amended and improved, should have been superseded by the action of ejectment, in which, as it now seems to be settled, nothing is recovered but the land, and the party is left, as at common law, to recover the mesne profits in a separate action of trespass. But the right to recover the mesne profits by way of damages in the modern action of ejectment itself, is recognised by an *English* statute, passed in the year 1664, and the practice of so recovering them, seems to have prevailed for some time in *England*, and also in this State.(*d*)

As early as the year 1667, in a case where lands were settled for the payment of debts, the trustees were held accountable in equity for the rents and profits to the creditors for whom they were received; and in 1685, it was held, by the Court of Chancery, that he who took the mesne profits by wrong, was considered as trustee for, and accountable to him who had the right; and thenceforward the Court of Chancery made all persons account for the mesne profits they had received, to such persons as had the equitable title. And it is now settled, that where there is a serious difficulty in recovering at law, fraud, concealment, or the like, or where the title is merely equitable, the party may recover the rents and profits in equity.(*e*) But in chancery, as in the courts of common law, there seems to have been always a strong disposition

(*d*) 2 Bac. Abr. tit. Ejectment, H.; 16 & 17 Car. 2, c. 8; Goodtitle *v.* Tombs, 3 Wils. 120; Lewis *v.* Beale, 1 H. & McH. 185; Joan & McCubbin *v.* Shields, 3 H. & McH. 7; Gore's Lessee *v.* Worthington, 3 H. & McH. 96.—(*e*) Norton *v.* Frecker, 1 Atk. 525.

to keep the adjudication upon the title entirely apart from the direction as to the mesne profits. It is not improper that the final decree, settling the right to the property, should also go on and decree an account for the rents and profits; but it is usual, where the property is sold, as in this case, to leave the account of the rents and profits to be provided for in the subsequent and further directions.(*f*)

Where the party has no equitable ground of relief, and is under the necessity of proceeding at law, by an action of trespass for the recovery of the mesne profits, the tenant or defendant, by pleading the statute of limitations, may prevent the plaintiff from carrying his claim in all cases, as far back as the commencement of his title, and the wrong he has suffered. And should he proceed in equity, if there has been a mere adverse possession without fraud or concealment, the account will be taken only from the time of filing the bill, for it was his own fault not to have filed it sooner. But where the bill is brought upon an equitable title, and there is a trust; and in the case of an infant, or where there has been any fraud; and in cases of dower, an account of the rents and profits will be ordered, and that from the time the title accrued.(*g*)

In an action of trespass for mesne profits, they are assessed at the discretion of the jury in damages, and therefore governed by no settled rule as to the amount. The jury may, if they think the circumstances of fraud and wrong warrant, or require it, give large and vindictive damages, even as much as four times the value of the mesne profits;(*h*) or, on the other hand, they may mitigate the damages down almost to nothing; and it does not appear, that their unlimited discretion, in this respect, has ever been materially controlled by granting new trials. The Court of Chancery is more steady in its principles, with regard to the amount of the mesne profits. If the occupant is the mere rightful holder of the property as a pledge; for example, as mortgagee who has been let into possession, he is held accountable for no more than he has actually received, what has really come into his hands, and not for the full value, or what he might have made by skilful and proper management. But where the occupant is a wrongful holder, or has obtained possession, and has held it fraudulently, or where, there

(*f*) 1 Bac. Abr. tit. Accompt, B.; 2 Bac. Abr. tit. Damages; Shish. *v.* Foster, 1 Ves. 88; Dormer *v.* Fortescue, 3 Atk. 121; Pulteny *v.* Warren, 6 Ves. 73.—(*g*) Dormer *v.* Fortescue, 3 Atk. 121; Pulteny *v.* Warren, 6 Ves. 73.—(*h*) Goodtitle *v.* Tombs, 3 Wils. 118.

being several incumbrances, the first mortgagee uses his security for the purpose of shielding the debtor from the junior mortgagees; in such cases, such a fraudulent or wrongfully occupying tenant, or an incumbrancer who makes such an ill use of his security, will be charged with the full value; that is, with such an amount of rents and profits as a skilful and diligent tenant might have made from the land.(*i*)

In this case, *Strike* informs us in his answer, that he obtained possession of the property in question, (the one lot actually, and the other legally, as landlord of *Rogers*, on whose property he levied a distress for rent in arrear,) under and by virtue of the deeds from *Rogers* to him, on the date of them, and that he took and received the whole rents and profits. Those deeds have been declared null and void by the decree of May 1822, as against the complainants, on the ground of fraud. It appears, then, that *Strike* obtained possession of the property in question, fraudulently; that he used those deeds against these creditors, and that he wrongfully held the possession, and received the whole of the rents and profits from the date of those deeds; consequently, according to the principles of equity, by which this court is governed, and I may venture to add, by the law of all civilized nations, in relation to rents and profits, *Strike* must be charged with the full value of the property in question, from the date of the deeds, down to the date of the sale, when he was turned out of possession.

In relation to the improvements, for which *Strike* claims an allowance, one would suppose, that in the administration of a system of jurisprudence in a civilized society, there could be no flux and reflux of the principles of justice; that however they might be altered or reformed, they could never, for any length of time, drop into disuse and then be called up again, and generally applied. But it would seem there is a fluctuation, perhaps indeed a mere change of fashion as to principles of law, as in every thing else.(*j*) It does not appear from any thing I can learn, that the doctrine, in relation to an allowance to the occupying tenant for ameliorations, except as to mortgagees in possession, has ever for a great length of time past, and until very recently, been presented to the consideration of a court of justice in this State as a subject of controversy; and, perhaps, never before so urged and investigated

(*i*) Powell, Mortg. 292, n.—(*j*) "The law sometimes sleeps, and judgment awakens it; for, *dormit aliquando lex moritur nunquam.*" Mary Portington's case, 10 Co. 42.

as it has been upon this occasion.(*k*) The principles of law, in relation to this matter, belong to our code, but until lately, they

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(*k*) Quynn *v.* Staines, 3 H. & McH. 128 ; Ford *v.* Philpot, 5 H. & J. 312 ; and Rawlings *v.* Stewart, ante, 22.

Rawlings *v.* Carroll.—This bill was filed on the 13th of October, 1730, by Aaron Rawlings, against Charles Carroll, Esq., Dr. Charles Carroll, John Digges, and Francis Hall, executors of James Carroll, deceased. The bill states, that in the year 1716, the plaintiff contracted to purchase of the testator, James Carroll, a tract of land called *Forest Farm,* for which he agreed to pay one hundred pounds sterling, in two equal payments at the time specified ; that the late James Carroll gave to the plaintiff a bond, conditioned for the conveyance of the land, on the payment of the purchase money, and the plaintiff gave to him his bond for the payment of the purchase money at the times agreed upon ; that afterwards, James Carroll made his will, in which he appointed these defendants his executors, and soon after died, without having conveyed the lands to the plaintiff according to the terms of his contract ; although the plaintiff had always been, and then was, ready and willing, thereupon to pay the purchase money ; and that the defendants had brought suit on the bond given by the plaintiff for the purchase money, and were about to enforce payment. Whereupon, the bill prayed, that the defendants might be directed to convey the lands to him as stipulated by their testator ; and that they might until then be enjoined from proceeding at law The injunction was granted, and issued accordingly.

The two Carrolls filed their answer, in which they admit the contract as stated, and that they had brought suit on the bond for the purchase money. But they aver, that their testator, according to the terms of his contract, had made a conveyance of the land to the plaintiff, as appeared by copies of the deed and a receipt for it given by the plaintiff, which they then exhibited with their answer ; that they were the principal and only acting executors ; that the defendant, Digges, had meddled very little with the estate, and the defendant Hall, had renounced the executorship.

To this answer the plaintiff put in a general replication. A commission was issued, under which testimony was taken and returned ; after which the case was set down for final hearing.

May Term, 1736.—This cause coming to be heard before his excellency *Samuel Ogle, esquire,* chancellor and keeper of the great seal, in presence of the counsel on both sides, the complainant's bill, and the defendants' answer, and the whole proceedings thereon were read, and appeared to be as before set forth.

Whereupon, and upon hearing the bill and answer, and the proofs taken in the cause read, and what was offered by counsel on both sides, this court doth think fit, and declare, that the defendants procure a conveyance from the heir at law of the testator, agreeable to the conveyance which the complainant received from the testator, and gave his receipt for, or procure an act of assembly to confirm that said deed, or such another, on or before the —— day of April ; and that, upon the execution of such deed by the heir, or confirmation of such deed by act of assembly, the complainant pay the consideration money, and the interest thereof, from the date of the complainant's bond, mentioned in the bill of complaint ; and in case such deed cannot be had from the heir at law, or that an act of assembly cannot be procured for confirming such a deed as herein before mentioned, that the complainant pay only the interest of the purchase money from the date of his bond, as a recompense for the use of the land ; and, that the judgment at law, and the injunction bond be deemed to be, and stand as security for the principal money and interest in case a

have been suffered to lie unnoticed among those rarely used regulations, which are seldom examined but by the curious. In a neighbouring State, so far back as the year 1643, it seems to have been deemed expedient to place upon its statute book, all the rules in relation to compensation for improvement, made upon the land by one man, the title of which was in another.(*l*) Yet upon a recent occasion, when a judicial decision was called for upon the occupying claimants law of *Kentucky*, involving matters which in a greater or less degree attracted the attention of the whole Union, it was found that those legislative provisions had disappeared from the revised statute book of that State, and it required some care to ascertain distinctly what was then its law upon the subject.(*m*)

It seems to be a sound and a very generally admitted principle of justice, that no man shall be allowed to enrich himself from the losses of another; or, as it is expressed in the *Roman* law, *nemo debet locupletari aliena jactura*. The moral force of this rule, in all cases to which it applies, and as between parties alike fair and innocent, appears to have been considered as altogether irresistible. In all cases in which the court is called on to apply this rule, it is

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title be made to the complainant as already mentioned; and if no such title shall be made, then the judgment at law, and injunction bond to stand as security for the interest of the money only.

The defendants in this cause having declared in court, that they applied to the last assembly for an act to confirm the deed, mentioned in the former decretal order made in this cause, but could not obtain such act; and that the heir at law is a minor, and will not attain his full age in several years, so that they have no means in their power to procure such a conveyance as is mentioned in the said order; therefore, they pray his excellency the chancellor's further order therein.

The chancellor having heard council on both sides, and taking the same into his consideration, doth think fit to order, that the injunction be made perpetual in this cause, in case the complainant shall pay the interest for the purchase money from the date of his bond, mentioned in the proceedings, and deliver up the possession of the land to the defendants, which are to be complied with by the last day of October next, with liberty to the complainant to finish his crop of all kinds on the said land, and remove his said crop and cattle therefrom; or that the injunction be dissolved. And further, it is ordered, that a reasonable allowance be made to the complainant, by the defendants, for any improvements which the complainant has made on the said land, and which may be useful and beneficial to any person who may, or shall hereafter have possession thereof. And also, that the complainant pay and satisfy to the defendants for any waste committed by the complainant on the said land, beyond what might have been proper in the use and working thereof, by the complainant, during the time of his possession thereof.—*Chanc. Proc. Lib. I. R. No.* 2, *fol.* 750.

(*l*) 1 Hen. Virg. Stat. 260, 349, 443; 2 Hen. Virg. Stat. 96.—(*m*) Green *v.* Biddle, 8 Wheat. 1, and Appendix, 1.

essential that it should most clearly and distinctly appear, that he who claims an allowance for his losses, in the shape of compensation for improvements, should be entirely and absolutely free from all blame; because equity never interferes in favour of a wrong-doer. In cases where a *bona fide* possessor of property, one who is ignorant of all the facts and circumstances relating to his adversary's title, under a confident apprehension and belief, that he was himself the true owner, proceeds to make improvements, and increase the value of the subject so held, it seems to have been almost universally admitted, that an allowance for such increased value should be made, at least to the extent of the rents and profits. According to the *Roman* law, such a claim for improvements may be extended to their full value, beyond the amount of the rents and profits as against the improved subject itself.(*n*) And so, too, according to the marine law, an account for meliorations is made, if necessary, even beyond the profits; and for ascertaining the amount, the rule is to consider the *quantum* of the improved state in which the ship comes into the hands of the original proprietors; for as to that part, it is not a restitution to them, but a new acquisition.(*o*) But according to the *English* principles of equity, if the true owner insists on an account of rents and profits, as he may, not according to the value when the purchaser entered, but according to the present value, the court will order an allowance to be made for repairs and improvements.(*p*)

But where a man has acted fraudulently, and is conscious of a defect in his title, or has bought a title notoriously bad at the time of the purchase, in such a case, as a *mala fide* possessor, he is permitted by no law to make any claim whatever for improvements; he must take the consequences of his own imprudence. By the *Roman* law it is declared, that if a man build with his own materials upon the ground of another, the edifice becomes the property of him to whom the ground belongs, because the owner of the materials is understood to have made a voluntary alienation of them, if he knew he was building upon another's land; and by the common law it is in general true, that where a tenant affixes any thing

(*n*) Dormer *v.* Fortescue, 3 Atk. 134; Pow. Mort. by Coven. 313, n. *o*; Kames' Pri. Eq. b. 1, p. 1, s. 3; b. 3, c. 1; Just. Inst. l. 2. tit. 1, s. 29, & notes; Sug. V. & P. 525; Savage *v.* Taylor, Fors. 234; Deane *v.* Izard, 1 Vern. 159; Shine *v.* Gough, 1 Ball & B. 444; Hardcastle *v.* Shafto, 1 Anstr. 185; Attorney General *v.* Baliol Coll. 9 Mod. 411; Webb *v.* Rorke, 2 Scho. & Lefr. 676.—(*o*) The Perseverance, 2 Rob. 239; The Kierlighett, 3 Rob. 101; Nostra de Conceicas, 5 Rob. 294.—(*p*) Sugd. V. & P. 525.

to the freehold, he does thereby immediately vest it in the freeholder, so entirely, that it would be waste, in the tenant, afterwards to remove it;(*q*) and so it has been held, in the *English* court of admiralty, that if a person buys a ship, the title to which is notoriously invalid, it must be at his own peril that he proceeds to lay out money in repairing and improving her, as no allowance for ameliorations will be made in such case.(*r*)

In the argument of *Coulter's* case,(*s*) among other things, it is said, "in divers cases, one who is in of his own wrong, shall recoupe and retain, &c. He who hath a rent of £10 issuing out of certain lands, disseises the tenant of the land, in an assise brought by the disseisee, the disseisor shall recoupe the rent in the damages; so that where the mesne profits of the land, in such case, were of the value of £13, the disseisee shall recover but £3. The disseisor shall recoupe all in damages which he hath expended in amending the houses." And as an authority in support of the last position, a case is cited as far back as the year 1340. This argument is adduced in a case in which the only question was, whether an executor *de son tort* could retain. The court in their opinion held that he clearly could not, assigning the most satisfactory reasons; and they then go on to say, that "as to the case of recouper in damages in the case of rent-service, charge, or seck, it was resolved, that the reason of recouper in such case is, because otherwise when the disseisee re-enters, the arrearages of the rent-service, charge, or seck, would be revived; and therefore to avoid circuity of action, and *circuitus est evitandus et boni judicis est lites dirimere, ne lis ex lite oriatur*, the arrearages during the disseisin shall be recouped in damages; but if the disseisor ought to have common on the land, the value of the common shall not be recouped, for by the regress of the disseisee, he should not have any arrearages or recompense for them."(*t*) The court take no notice of the position advanced in the argument, that "the disseisor shall recoupe all in damages which he hath expended in amending of the houses," and assign a reason for allowing the recouper in the other instances put, that is utterly incompatible with allowing a disseisor or *mala fide* possessor, to recoupe what he had expended in mending the houses, and therefore the position cannot be admitted to be sound law, to the full extent for which it was advanced, if at all.

(*q*) Am. & Fer. Law Fix. 14, 241.—(*r*) Just. Inst. b. 2, tit. 1, s. 30; Nostra de Conceicas, 5 Rob. 294.—(*s*) 5 Co. 30.—(*t*) Green *v.* Biddle, 8 Wheat. 81.

The term *recoupe* in the common law, signifies the keeping back or stopping something which is due, and is used for "to defalk, or to discount;" of which *Coulter's* case furnishes an illustration. It is from the common law doctrine of recouper that our legislative provisions for "pleading discount,"(*u*) and the *English* statutes of set-off, about half a century later, have been derived.(*v*) They all rest upon precisely the same principles. The object is to prevent cross actions, or, as the books express it, circuity of action; and to allow the opposing claims of the same parties to be settled in one action, which must otherwise necessarily give rise to two actions; but however reasonable and desirable it may be, thus to put an end to two subjects of litigation in one and the same suit, yet, as it appears from *Coulter's* case, no man shall be allowed to obtain this advantage by his own wrong; and therefore it is, that an executor of his own wrong will not be allowed to recoupe and retain.

Every claim, however, must have a fair, legal, or equitable basis, whether presented to the court as the cause of an original action, or by way of recouper, discount or set-off. The claim for rents and profits, and the opposing claim for improvements, each of them rests upon principles of law and equity that are wholly separate and distinct. Whether or not the proprietor shall recover rents and profits must, in each case, depend upon the justice and equity with which he sustains his claim. If he has, for an unreasonable time, slept upon his rights, and there should appear to be any suspicious circumstances about his case, or any discoverable infirmity in it, the court will lessen, or altogether reject the claim. So, on the other hand, he who presents a claim for ameliorations, must, in like manner, show, that it is sustainable on its own independent, substantial, and fair principles of equity; as it stands exhibited before the court, it must appear in all respects unsullied by wrong or deception; it must have no taint of fraud about it;—if it has, it cannot be allowed.

Such claims as these for rents and profits, and for ameliorations, may very often present themselves in a court of equity in opposition to each other; and be set up by litigating parties, by way of recouper, discount or set-off, the one against the other. But if, as in the case of an executor *de son tort*, a man shall not be permitted to take advantage of his own wrong, even so far as to place him-

(*u*) 1654, ch. 23; 1699, ch. 39; 1715, ch. 29; 1729, ch. 20, s. 5; 1785, ch. 46, s. 7. Baltimore Insu. Comp. *v.* M'Fadon, 4 H. & J. 42; Brack. Law Misc. 185.—(*v*) 2 Geo. 2, c. 22, s. 13; Just. Inst. b. 4, tit. 6, s. 30.

self in a situation to recoupe a just and equitable claim, most certainly the law would not endure a wrong-doer to oppose a fair claim, in any degree whatever, by one which had originated, and was wholly founded in his own wrong. Hence it is that a *mala fide* possessor can, in no case, nor under any circumstances, be allowed any thing for improvements, either beyond or even to the amount of the rents and profits. A different rule, as has been justly observed, would place it in the power of the wrongful possessor, to improve the right owner out of his estate. Yet it is said, that where the sums are large, the peculiar circumstances of the case may influence the court in directing the account to be taken from the filing of the bill only, and not from the time of taking possession.(*w*)

Now how stands the case under consideration in reference to this claim for improvements? The bill charges, that *Rogers* conveyed the property in question to *Strike*, for the purpose of avoiding the payment of *Rogers'* creditors; *Strike* answers and denies the charge, and avers, that the conveyances to him were absolute, fair, and for a valuable consideration, and that he is the *bona fide* purchaser and holder of the property. But the court, by the decree of May, 1822, has declared those conveyances to be null and void, as against the complainants, and directed the property to be sold for their benefit. Hence it clearly appears, that *Strike* now stands before this court convicted and condemned as a fraudulent and *mala fide* purchaser and holder of the property. He, one of the very contrivers, and a party to the fraud, claims an allowance for improvements on the property so obtained and held. Such a claim, it is believed, was never sanctioned by a court of justice, in any country or at any time. According to all law, and every principle of equity, this claim for improvements of every description, must be totally and absolutely rejected.

Strike's claim for repairs and improvements has been thus disposed of, on general principles. But it is alleged he has another and special foundation for his claim for ameliorations and advances, under the concluding sentence of the decree of May, 1822. But, that decree has declared the deeds from *Rogers* to *Strike* "null and void as against the complainants;" it has retained them as a security for nothing, and in no respect whatever. The several parts of that decree must be made to harmonize one with another. Those deeds which have been so totally annulled, as against the com-

(*w*) Sugd. V. & P. 526.

plainants, cannot, therefore, consistently with that decree, be allowed to stand as mortgages against them, to secure to *Strike* either the amount of the improvements, or the advances in money he has made to *Rogers*. Upon that ground *Strike* cannot stand, because it is completely covered by the decree. This being the decided opinion of the Chancellor, he might deem it unnecessary to notice that class of cases which speak of allowances for improvements and advances made by actual mortgagees, or by those *pseudo* purchasers of young heirs and others, whose conveyances are allowed by special favour, to stand and be considered as of the nature of mere mortgages. Yet from the manner in which those cases have been pressed forward, some further reasons, showing why they are inapplicable to this case, may be expected.

In this case it must be distinctly and constantly recollected, that *Strike* now claims reimbursement for his improvements and advances, not of *Rogers*, but out of the proceeds of the property in question, and against the creditors of *Rogers*, who are here as the complainants. All those cases of mortgages and *pseudo* purchases, are governed alike by the same principles of equity. A separate examination of each of them will therefore be entirely unnecessary.

In all, the bill is brought by the grantor against the grantee, or between parties who stand precisely in that relation to each other, to redeem the mortgaged property, or to set aside a conveyance which had been improperly or fraudulently obtained. And on the case being made out by the proofs, the tribunal has uniformly answered to him who asked the relief, "you must do equity before you shall obtain equity. It is true, you have been imposed upon and defrauded—but it is no less true, that you have been partially and in some degree benefitted; you have received money from your opponent; he has permanently enhanced the value of your estate; refund the money you have received, pay for the increased value of your estate, and it shall be restored to you; the conveyances of which you complain shall be annulled; until then they shall stand as a security for those improvements and advances." Such is the language of the Chancellor in those cases where he acts under the influence of the maxim, that he who asks equity must do equity; and this maxim is sanctioned and illustrated by an almost endless variety of cases to be found in the books.

But the application of this maxim in these cases, and for the most part, depends not only upon the immediate relationship between the parties of grantor and grantee, but also, almost always,

upon the vendee's being brought before the court by the vendor; that is, the contracting party injured as plaintiff, against the party injuring as defendant. A few examples will sufficiently illustrate this position: The plaintiff came to be relieved against the penalty of a bond; the ground of equity was established by the proofs, and the relief was decreed, but not without the payment of principal and interest, even although it exceeded the penalty of the bond.(*x*) But where lands were devised for the payment of debts, and there was a bond debt, the interest of which had outran the penalty, yet the creditor, on a bill filed by *him*, was allowed to recover no more than the penalty. In the first case the creditor was sustained by this maxim of equity; in the second, his case rested barely on his own contract. Again, the plaintiff for ninety pounds lent, fraudulently obtained a bond for eight hundred pounds, on which he obtained a judgment, and the object of the bill was to have certain lands subjected to the plaintiff's satisfaction in equity. But the court would not give him any relief, not so much as for the principal he had really lent, and dismissed his bill. If, however, the defendant in this case, had come in to set aside the judgment for fraud, equity would have obliged him to pay the ninety pounds really lent. This case is also illustrative of another maxim, that he who has committed iniquity shall not have equity.(*y*)

Now in order to bring these cases, and the principle they illustrate, fully to bear upon the case under consideration, it must appear, that the complainants not only claim under *Rogers;* but, that they stand here, in all respects, as he would have stood; and that they ask to have these deeds vacated upon the same grounds, that he could have made a similar prayer. But the case now before the court is of a totally different nature. *Rogers* himself is here as a defendant, charged as a *particeps fraudis*, and relief is prayed by these complainants against him as well as against *Strike*. The present creditors do certainly claim this property under *Rogers;* and it is also true, that they can only take it, subject to all fair, legal and equitable liens with which *Rogers* may have incumbered it, antecedent and superior to their claims. But, as against *Strike*, these plaintiffs are to be considered as purchasers of the most favoured and meritorious class, holding by a prior and superior title. The improvements and the advances for the ground rent, the *Pratt-street* assessment, and the taxes alleged to have been made and

(*x*) Fran. Max. 4. note; 2 Ev. Poth. Obl. 89.—(*y*) Fran. Max. 8.

paid by *Strike*, give him no lien upon the property itself against the rightful owner, either *Rogers*, these creditors, or any one else. But if *Rogers* had come here to be relieved against the fraud practised on him by *Strike*, and to have the property restored to *him*, the court would have granted him relief only upon condition of his reimbursing *Strike* for all his improvements and advances, because they enured to the use and benefit of *Rogers*. But no equitable principle of that sort can be urged against the complainants. They are here as creditors, praying to be relieved against a fraud contrived between *Rogers* and *Strike*.

But, admitting all this. It is alleged, that, independently of the vacated deeds and of the decree, *Strike* has a claim, as a kind of *salvor* of this property, which ought to be allowed. It is said he has saved it from the hands of the ground landlord, by paying the ground-rent; he has saved it from the grasp of the Pratt-street commissioners, by paying the assessment levied upon it; and he has saved it from the power of the State, by paying the taxes. He maintains, that he has a right to assume the place, and to be substituted for those claimants, and he founds this claim upon the doctrine of *substitution*. But *Strike*, as regards these complainants, was an uninvited officious *mala fide* meddler with property which he knew did not belong to him, and which he was apprised ought to be liable to the claims of *Rogers'* creditors. He made these advances to serve himself, not for the benefit of these complainants; and if he had an intention, that these advances should enure to the personal benefit of any one, it must have been to *Rogers;* because it was from him he took the estate; and if the conveyances were to be annulled, it was only against him he could seek reimbursement.(z) *Strike*, therefore, cannot have, against these complainants, any shadow of countervailing equity on which to rest his claim for these advances, out of the proceeds directed to be brought into court.

Having discussed the liabilities and pretensions of the defendants, let us now consider the interests of the complainants among themselves. This is what is commonly called a creditors' bill; and where two or more creditors bring such a bill, or others come in afterwards, the adjustment of their rights and interests, in relation to each other, and the objections which the defendants may make against those who have come in, after the institution of the suit, most generally remain to be considered and decided when the

(z) Kames' Pri. Eq. b. 1, p. 1, s. 3.

court is called on to make a distribution of the fund. The claim of the plaintiffs has, as we have seen, to a certain extent, been settled and determined by the decree of May 1822; and therefore, their claim is not now to be reconsidered and reinvestigated.

It has been objected, that the bill does not, as it ought, allege that the complainants sue as well for the benefit of other creditors, as for themselves. It is often a matter of some perplexity to determine who ought to be made parties, the rule being laid down in general terms, that all who are interested in the decree should be made parties. This decree virtually recognises this as one of those cases in which all the other creditors of the debtor, against whom, or whose estate the suit is brought, may come in either before or after the decree, or at any time before the assets have been distributed, and claim a proportionable share of them. And supposing the bill had alleged, that the originally suing creditors sued as well for others as for themselves, it is said, that the right of such others to come in could not now have been questioned. In *England* it seems to be an established rule, in cases of this kind, that the bill should distinctly allege, that the complainant institutes the suit, as well for the benefit of all others who may thereafter come in, as of himself. In this State such a *qui tam* allegation in bills of this nature is very common, and is certainly very proper and useful in apprising the court, and all concerned, at once, of the object and character of the suit. But this is the first instance here in which such an objection, to a bill of this kind, has ever been made, so far as I have been able to learn. In this case, it sufficiently appears from the whole proceedings, bill, answers, orders and decree, that this is a case in which other creditors may come in; and therefore in this instance, and in this stage of the case, I cannot say, that the bill is erroneous and deficient for the want of such an allegation; consequently the other creditors of *Rogers* may be permitted to come in and participate, notwithstanding there is no such allegation in this bill.(*a*)

But it is objected, that those other creditors who, it is alleged, have actually come in to partake, have not presented themselves in legal and proper form, that their claims have not been sufficiently authenticated and proved; and, even if these objections were removed, that their claims are barred by the statute of limitations. These objections will be severally considered, and also the reply,

(*a*) Martin *v.* Martin, 1 Ves. 214.

that such objections can only be made by the defendants, and not, as in this instance, by a creditor or co-plaintiff.

In *England* it is the established practice, after a decree to account has been obtained in a creditors' suit, to give notice by advertisement in the *Gazette*, to all the other creditors, to bring in their claims to be adjusted before the *Master*;(*a*) and the mode of doing so, is by the creditor's producing the voucher thereof with his affidavit of the amount then remaining due.(*b*) In this State the practice is nearly the same. But in some special cases the creditor has been allowed to bring in his claim by petition, in order that its nature and peculiar merits might be more particularly set forth; or that he might be permitted to assume the position of a co-plaintiff before the decree, so as to authorize him to prosecute the suit, and to have a voice and vote in the appointment of a trustee.(*c*) And there are instances in which the creditors have been called in before a decree, in order to ascertain the amount necessary to be raised by a sale of the real estate.(*d*) But with these exceptions

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(*a*) The Case of the Creditors of Sir C. Cox, 3 P. Will. 343.—(*b*) 2 Harr. Pra. Chan. 36; 2 Fow. Ex. Pra. 252; Hardcastle *v.* Chettle, 4 Brow. c. c. 163.

(*c*) McMechen *v.* Chase.—This was a suit instituted by a creditor of a deceased debtor against his heirs to have his real estate sold for the payment of his debts.—In which suit Elizabeth Edwards, by petition, setting forth, that her testator was a creditor of the deceased, prayed to be admitted as a co-plaintiff, so as to come in, participate, &c.

1*st October*, 1816.—Kilty, *Chancellor*.—The prayer of the above petition is granted.

After which there was a decree for a sale, under which a sale was made and confirmed; and sundry other proceedings were had, when the case was brought before the court.

6*th November*, 1820.—Kilty, *Chancellor*.—I consider the practice, as to the act of limitations, to be similar to that of the courts of law. If the defendant, in his answer, contests the claim in any other manner, without pleading, or relying on the act, he cannot afterwards resort to that defence. Claims filed, on the sale of a real estate, by creditors, not originally parties, are subject to be contested by the heirs; not usually by answer, but by some written notice of their defence. A defence was made in writing to this claim, on the part of the heirs, on the 10th of February, 1818; after which witnesses were produced, on both sides, and proceedings were had before the auditor. The plea, now relied on, was filed on the 10th of December, 1819, and cannot be admitted.

(*d*) Corrie *v.* Clarke.—This was a creditor's bill filed on 22d April, 1800. It begins thus: "The bill of complaint of James Corrie, administrator of John Corrie, and in his own right, in behalf of himself, his intestate's estate, and others the creditors of Parrott Clarke, late of Caroline county, deceased, sheweth that the said," &c. &c.

19*th May*, 1802.—Hanson, *Chancellor*.—Ordered, that the creditors of the said Parrott Clarke, by the publication of this order, at least three times before the 16th day of June next, in the Easton newspaper, be notified to bring into this court their

the course has been for the creditors to come in by filing the vouchers of their claims, in the Chancery office; and this may be regarded as the present well established practice of this court. In this form a creditor may come in at any time before a distribution of the proceeds of the sale has been actually made; and before a final audit has been ordered and ratified; but if the auditor had previously made a statement, the cost of the restatement must be borne exclusively by such new applicant.(*e*)

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respective claims, with the vouchers thereof, on or before the 16th day of August next, to the intent, that there may be ascertained the sum necessary to be raised by a sale of the real estate of the deceased for the payment of his just debts.

After which the case came on for a final hearing.

4th January, 1803.—Hanson, *Chancellor*.—The complainants' claim against the said Parrott Clarke, deceased, being established to the satisfaction of the Chancellor; and it appearing, that the personal estate of the said Parrott Clarke is insufficient for the payment of his debts—*decreed*, that the lands be sold, &c.

A sale of the real estate was made, reported, and finally ratified accordingly. A commission had been issued in the usual form, to appoint a guardian to the infant defendants, and such a guardian had been appointed accordingly, who answered for them.

23*d August*, 1803.—Hanson, *Chancellor*.—Ordered, that the principal money, arising from the sale of the estate of Parrott Clarke, deceased, be applied agreeably to the auditor's statement of the 12th instant; and, that whatever interest is paid by the purchaser shall be divided, in due proportion, amongst the persons entitled to the principal. But, inasmuch as the Chancellor knows not whether the heirs of said Clarke are of years of discretion, or have a guardian to their persons and estate, the balance of £143 2*s*. 1*d*., must be subject to the Chancellor's future order.

(*e*) Angell *v*. Haddon, 1 Mad. Rep. 528; 2 Fow. Ex. Pra. 254; Davies *v*. Stewart, per Johnson, Chancellor, 17th February, 1823.

O'Brian *v*. Bennet.—This bill was filed by O'Brian and wife on the 18th of June, 1800; by which it appears, that the defendant Pouder, being seized in fee simple of a lot of ground in Baltimore, sold it to Francis Caskey for £687 10*s*., and gave Caskey his bond to convey it to him when he paid the whole purchase money; that Caskey paid £337 10*s*. in part; that afterwards he mortgaged his interest for a certain sum of money to the defendant Patrick Bennet; after which Caskey devised his interest to Martha, one of the plaintiffs; and died. And then the defendant Pouder conveyed all his right to the defendant Bennet—that Bennet holds possession and refuses to convey, or to suffer the plaintiffs to redeem. Prayer for general relief, &c.

On the 27th January, 1802, a decree was passed, by consent, for a sale in the common form. The amount due Bennet, was also agreed by writing, dated 8th October, 1801. A sale was made and reported accordingly, which, by an order of the 19th of May, 1802, was at once absolutely ratified, the persons concerned having expressed their approbation thereof—that is, the plaintiffs and defendants.

The property having sold for more than enough to satisfy the claims of the defendants, the plaintiff Charles O'Brian, by his petition, stated, that he having been appointed the executor of Charles Caskey, as set forth in the bill, had obtained letters testamentary; that the personal estate of Caskey was exhausted; that he had been

With regard to the proof of claims, brought in by other creditors, it has been the practice in cases of deceased persons' estates,

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sued and was likely to be made liable for a large amount of debts; and therefore prayed that the surplus of the proceeds of sales in this case might be paid over to him as executor.

9th June, 1802.—HANSON, *Chancellor*.—Ordered, that the creditors of Francis Caskey, deceased, be notified by a publication of this order three Tuesdays or Fridays in the Baltimore Telegraph, before the end of the present month, to exhibit their claims, with the vouchers thereof, to the Chancellor, before the first day of September next; in order, that after that day a dividend may be made amongst the said creditors of about £600, arising from the sale of certain property, mortgaged by the said Caskey, over and beyond the mortgage debt and costs, &c.

After which, Bernard Caskey, as creditor of Francis Caskey, deceased, by a petition, prayed to have his claim discharged out of the surplus remaining after discharging the mortgage.

16th October, 1802.—HANSON, *Chancellor*.—Ordered, that the trustee for the said sale, by publishing this order three Tuesdays or three Fridays in the Baltimore Telegraph, before the 15th day of November next, do give notice to the creditors of the said Francis Caskey, deceased, to exhibit their claims, with the vouchers thereof, to the Chancellor, before the first day of February next, to the intent that a fair dividend of the said surplus may be made amongst the just creditors of the said deceased.

This order was published, and, in consequence thereof, several creditors exhibited their claims, an account of all which was stated by the auditor.

13th February, 1803.—HANSON, *Chancellor*.—Ordered, that the money arising from the sale of the estate of Francis Caskey, be applied according to the auditor's statement filed on the 11th instant; and that the balance of £328 0*s*. 3*d*. be paid to Charles O'Brian and wife.

After this, on the 1st of March, 1803, William Richardson, by his petition, stated, that the late Francis Caskey was indebted to him, the vouchers of which he filed, being short copies of judgments obtained by Bernard Caskey, against the plaintiff, Charles O'Brian, as administrator of F. Caskey, a part of which were assigned to the petitioner, and the surplus still remained in the hands of the trustee, who was apprised of this application, and would not pay over the proceeds, until this claim was acted upon. Prayer that the claim be allowed.

1st March, 1803.—HANSON, *Chancellor*.—In this case, the Chancellor has passed an order for discharging the claims which had been filed and passed, and for the residue of the money arising from the sale to be paid to Charles O'Brian and wife.

It seems, this order has not been fully complied with, and this day, for the first time, claims are exhibited, with a prayer, that they be discharged by an application of the said residue. The Chancellor being satisfied of the justness of the said claims, cannot do otherwise than direct an application accordingly. And, had the said claims been exhibited in due time, no order would have been passed, as aforesaid, in favour of O'Brian and wife. It is well, that an application is made before the money is paid under that order. But had the money been so paid, no blame could attach to the *court* or to the *register*.

The Chancellor regrets, that he feels himself compelled, by a paper which has met his eye, to make certain remarks, which, at first sight, may appear unnecessary, if not improper. There is not the slightest reason for him to believe, that the aforesaid claims were ever before this day received into the office. It is far more probable,

to require no higher proof than such as would induce the Orphans Court to allow the claim according to the testamentary system, in case no objections were made. Because there being no other mode by which the real estate of a deceased debtor can be subjected to the payment of his debts generally, including those due by simple contract, than by bill in chancery, the decree in such cases formerly expressly declared, that the real estate should be sold "for the payment of the just claims of the creditors of the deceased in a due course of administration," and the law required, that the real assets should be paid by the heir or devisee in the same order as the personalty was directed to be administered by the executor or administrator;(*f*) therefore, this court has felt itself authorized and required to make a distribution of the real assets upon the same grade of proof, and in the same order, as has been prescribed by law for authenticating and paying claims against the personal estate before the Orphans Court.(*g*) So that the same claim, whether made against the personalty or the realty, or whether presented to one tribunal or another, should, as to the mode of authentication, be governed by the same rule; and I find this practice spoken of as far back as the year 1803, as then well established.(*h*)

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that, being either put into the mail, or enclosed in a letter to be delivered by a private hand, they never reached the office, than it is, that the register, having received, carelessly lost or mislaid them.

It is injurious to the Chancellor to allege, that a claim with proper vouchers, filed in this court, cannot be established without the aid of counsel. Any man, attending to the proceedings of this court, might know, that all claims for money, arising from sales under a decree of this court, are either examined in the first instance by the Chancellor, or submitted to, and reported on by the auditor; and that counsel are rarely, if ever, employed to support any claim, except those claims which are disputed, and which are not, in the first instance, supported by proper proofs or vouchers.

The Chancellor has made these remarks; because he conceives, that it cannot be improper for any man, or body of men, by a plain declaration, to refute a calumny, which, (if unnoticed,) might produce disagreeable, mischeivous consequences.

It is ordered, that of the money arising from the sale, in this cause, heretofore directed to be paid to O'Brian and wife, there be paid to Bernard Caskey, the principal sum of seventy five pounds, with interest thereon, from the 12th day of April last, until payment by the purchaser. And, that there be paid to William Richardson the sum of one hundred and seventy seven pounds, seven shillings, and nine pence, with interest as aforesaid; and that, unless a further claim, or claims, be preferred before the balance be paid to O'Brian and wife, in whose hands, money arising from the sale aforesaid, would have been answerable, &c.

(*f*) 1785, ch. 80, s. 7.

(*g*) 1798, ch. 101, sub ch. 9.

(*h*) Ringgold *v.* Jones.—This was a creditors' suit instituted on the 21st of November, 1799, by William Ringgold, and others, in behalf of themselves and others, the creditors of William Sluby, deceased, against Jones and others, his executor and

In cases of insolvency, under the acts of Assembly which formerly referred such matters to the Chancellor, it was the practice

devisees. The answer of the executor admitted the total insufficiency of the personal assets. The other answers were to the same effect; and on the 2d July, 1801, a decree was passed, ordering a sale of the real estate in the usual form.

It appears that Benjamin R. Morgan, another creditor, came in by filing the voucher of his claim, which the auditor, by his report of the 22d June, 1802, declared to be wholly inadmissible. After which, Morgan filed his petition, praying, that the Chancellor would take the subject into his consideration, and give such directions to the auditor, as he thought proper. On the 25th November, 1802, Morgan, by petition, prayed for further time to produce satisfactory proof of his claim; and the Chancellor appointed a day for hearing, &c. On the 12th February, 1803, William Ringgold, and also James Ringgold, two of the originally suing creditors, by petition, objected to the allowance of the claim of Morgan; because it was founded on a partnership transaction, which had been settled, and that the claim had been paid: and on the 30th of April following, one of them, James Ringgold, filed sundry objections to Morgan's claim, the first of which is thus expressed: "That the same is for a balance stated to be due on a partnership between the said parties, ending in the year 1774, which ought not to be allowed, *on account of the lapse of time*, and being unsettled by the parties themselves, is exhibited by the executor, [B. R. Morgan,] of one partner against the real estate of the other, where the creditors of Sluby have no opportunity, by producing his books, to invalidate the same."

2d May, 1803.—HANSON, *Chancellor*.—Benjamin Morgan having exhibited a claim against the said Sluby's estate, which the auditor of this court rejected, the Chancellor, on application of one of the said Sluby's creditors, passed an order, declaring, that on the 24th of April last, he would, on application, decide on the said claim, provided notice, &c. &c. Notice has been acknowledged by Morgan's solicitor, who appearing, here produces no proof or voucher, to establish the claim heretofore made; but prays further time, and instructions from the Chancellor; and an order for the producing of books, &c.

It is certain, that at the time of passing the last order for deciding, &c., it was the chancellor's intent, and it was so understood, as it seems, by the said solicitor, and the creditor, that the aforesaid claim should, at the time appointed, be decided on, and the applicant aforesaid unite in the decision's taking place.

The act of 1735, ch. 72, has been always understood, as directing the lands of a deceased debtor, who devises, or suffers his real estate to descend to an infant or infants, to be sold under the authority of this court, in aid of the defective personal estate, to pay the debts of the deceased which are established to the Chancellor's satisfaction. No mode is prescribed by the act for establishing the debts. It is left entirely to the Chancellor's discretion; but he has observed, it is a rule to admit claims on such proof as is prescribed for, and is satisfactory to an Orphans Court, and even to admit claims, passed against an executor or administrator, by an Orphans Court, unless objected to by some person interested, viz.: by a creditor of the deceased, or his executor or administrator, or by the guardian of the infants.

When claims are objected to on one part, and persisted in on the other part, the question is, in what manner shall it be tried? If every disputed claim should be directed to be tried by a jury, very considerable expense might, in many instances, be incurred; and the fund, for the payment of just debts, would become inadequate, or the infants might be impoverished. The Chancellor has never thought it necessary, or indeed proper, in the case of any disputed claims against a deceased person, to send out an issue, or to refer the party to an action at law. Indeed it would be difficult, in most cases, to ascertain the proper parties for an issue. The executor or

to consider the insolvent's schedule, or his voluntary admission, as sufficient evidence of the debt; or if the insolvent was dead, then

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administrator surely would not be compelled, without being a party, to act as defendant on the trial of the issue. However, in all cases where a claim depends on a single fact, or facts, strongly litigated, and of difficult investigation, the Chancellor conceives, that in some manner an issue ought to be tried. For instance, a bond is exhibited with an affidavit of no payment, &c.; payment is alleged; but no receipt is produced; or if a receipt be produced, there is an allegation of forgery. In such a case, an issue may be sent out to be tried between the claimant and the party alleging; if the said party chooses to be considered as plaintiff on the trial of the issue.

In the present case, the claimant has filed an account with an affirmation of the truth of the account. The person taking the affirmation has not certified the affirmant to be a Quaker, Menonist, Tunker, Nicolite, or other person, entitled by law to have his affirmation to be on a footing with an affidavit by a common person. Of course, the affirmation is to stand for nothing.

The petitioner, Benjamin Morgan, has supposed the objection to his claim is, that his account is not regularly stated. He is mistaken. The objection is, that he has no proofs or vouchers to establish any claim against the deceased. He claims, as the representative of a partner with the deceased. He charges the deceased with all goods sent to him, and gives no credit, unless for remittances in money, or other things. The balance he considers as the sum to him due; or if he and the deceased were partners, he considers himself entitled to one half of the balance. His account resembles little a partnership account. A and B are partners. A sends £10,000 worth of goods to B, who remits to him £8,000. Can it be supposed, that merely from this, B owes £2,000 to the partnership; and of course owes £1,000 to B? No! The charges of the store are to be taken into the account. There may be losses of the articles, or they may have been sold for less than was expected; or they may have been sold for a great profit. In fact B was only to credit the company with the sale of the articles, and to charge every expense of storekeeping; and if there was a balance in favour of the partnership, that is to say, if, after deducting all expenses the sale of the goods amounted to not more than £10,000, it is impossible that B shall be in debt to A.

The claimant, Morgan, has, by his petition, requested the Chancellor, to instruct the auditor with respect to the mode of stating the account. What can the Chancellor do more, if he shall direct the auditor, than order him to state the account, as other accounts are stated? The auditor's objection to the account, was not merely as to the mode. The auditor was of opinion, that an account charging the goods sent to Sluby, and crediting him only with what he sent to Morgan, could not possibly be a just statement of a partnership account.

Morgan, by his petition, requests an order for the production of books in general. Perhaps the law, usage, or practice of this court, respecting the production of books, is less understood, in general, than any part of the jurisdiction of this court. The power of ordering books, has ever, as it ought to be, been exercised with great caution. No instance can be shewn, where a man has been considered as entitled to the production of private books, *in which he has not an interest*. And in all cases where books have been ordered to be produced, the particular books have been specified; and the court has been first satisfied of the necessity of producing them. But, in no instance has a man, who is not a party to a suit, been compelled to produce private books. Is it conceivable, that Morgan, exhibiting a claim against Sluby, in a summary way, without filing a bill against any person whatever, is entitled to an order against every person whom he alleges to have in his possession certain books

such proof as was admitted to sustain claims against deceased persons' estates. But, if the insolvent denied the debt, or there was any discrepancy between his schedule or admission and the creditor's claim, then the creditor was put to full proof.(*i*) But the statute of limitations was never considered as an objection to the payment of a claim, either in the case of a deceased person's estate, or in the case of insolvency, unless it was specially relied upon. The case now under consideration is substantially and in truth, a case of insolvency; not, indeed, referred to the Chancellor by any special act of Assembly, but one which has been brought here by these proceedings, and in due course of law; and, therefore, the assets now here will be distributed upon such principles and proof as have been applied and required in similar cases, where no objection to the claim has been made.

But the originally suing creditors have objected, that the claims of the other creditors, who have come in since the institution of the suit, are not sufficiently sustained by proof; they have also objected that those claims are barred by the statute of limitations; and their reliance on the statute was made, and sent with the reference of the case to the auditor. The reply to these objections, in argument, is, that they are such as can only be made by one or other, or both of the defendants; and not by a creditor or co-plaintiff.

The debtor or his heir, has so manifest an interest in the real estate which it is proposed, in cases of this sort, to subject to the payment of his debts, that there never seems to have been any difference of opinion as to his right to make such objections. Where an executor or administrator fails to make such objections,

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which may throw light on the subject? Suppose an order on A B, to produce books, without any specification, and the order not complied with, by producing any books whatever. Is A B instantly liable to attachment? It would be ridiculous to suppose it. The fact is, that no man has a right to the production of another's books; and every man may do as he pleases with his own books. Each partner, indeed, is entitled to the benefit of all books kept by the partnership. But then the person in whose possession they are, must, in some way, be made a party to a suit, before they can be ordered to be produced.

It appears to the Chancellor, that the utmost he can grant to Benjamin Morgan, is further time for establishing his claim; and that the Chancellor cannot, in this case, with propriety, for the reasons herein assigned, direct any issue, or issues to be tried. It is, on the whole, ordered in the presence, or with the assent of Morgan's solicitor, that he be allowed until the first day of July next, to produce his vouchers, and have his account against Sluby, (if any just account he hath,) stated by the auditor of this court.

(*i*) 1 Ev. Poth. Obl. 409.

or waives them, or there has been a judgment against him; still the heir or devisee may make such objections in defence of the real assets. And where the executor and some of the heirs waive them; yet, any other of the heirs or devisees may alone make them in defence of the whole of the real assets, as was done in the case of *Wm. Frazier's* estate in this court.(*j*) It seems to

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(*j*) EDMONDSON *v.* FRAZIER.—This bill was brought by creditors to subject the real estate of the deceased debtor to the payment of his debts. The estate was sold accordingly under a decree in the usual form. The auditor, in his report of the 29th January, 1822, says, "the act of limitations, which, as a bar to the creditors' claims, is relied upon by the distributees only, the auditor is not satisfied they are entitled, under the circumstances, to the benefit of it." This report was excepted to by the distributees on this and other accounts.

10*th April*, 1822.—JOHNSON, *Chancellor*.—Exceptions to the auditor's report are filed. The complainants except to that part of the auditor's report unfavorable to the claim of Nicholas Hammond, which claim is founded on a bond executed by one John Mace, and William Frazier, the above deceased, as security. The auditor, in conformity with the usual course of the court, would not allow the claim without evidence to establish the allegation in the bill, that Mace, the principal debtor, was insolvent. A court of equity when it interposes, and adjusts the relative obligations of contracts and agreements in which more than *two* parties are concerned, calls them all before the court; that a complete and final adjustment may take place, and each be compelled to pay his just portion; and thereby the creditor draws from each, being solvent, what equitably ought finally to be drawn from him. It will not compel the one, both of the debtors being solvent, to pay the whole, and turn him over to his co-security to restore the one half. When, therefore, estates are sold to pay debts, and in which the interests of minors are generally deeply involved, it becomes the duty of the court, to see, that no claim be allowed, in which the deceased, with others, stands indebted, without satisfactory proof being produced, that the other persons joined in the obligation were insolvent. But as that proof is now produced in support of the claim No. 4, the same is hereby allowed, and the trustee is directed to pay the same, with a due portion of the interest received, or that shall be received.

Exceptions are filed on the behalf of Wm. R. Stewart and wife, of Samuel Wright and Mary Elizabeth Wright, to the claim distinguished by No. 3. This claim, by the answer of those who are only interested in its rejection, under the decree, is strongly contested, and the act of limitations relied on as a bar to the recovery. The answer of one defendant, in chancery, can never implicate the interest of a co-defendant; but more especially, when the person, so answering, is not interested in the matter in controversy. The answer, therefore, of *Wm. Steward's* (Frazier's) widow, and executrix, who had exhausted the personal funds, never can be received to charge the real. They can only be affected by the answer of those interested in them, or by the exhibition of such proofs as will bind them. The claim No. 3, rests on a bond dated 7th February, 1790; and on an open account, about the same time. The bill in this cause was filed on 23d October, 1815, more than twenty-five years after the bond; which was made payable forthwith A sufficient length of time has elapsed to presume payment. Nor is there any evidence in the cause to remove the presumption. The exception taken to the claim No. 3, is therefore supported, and the claim is hereby rejected. The auditor is directed to re-state the account, rejecting the said claim.

be conceded on all hands, that these originally suing creditors have an interest in these real assets; but, yet it is urged, that they cannot make such objections as these against the claims of their fellow creditors. This matter must be determined by practice, on principle, and on authority.

The defendants, or the representatives of deceased debtors, are generally, from strong motives of interest, so very active in their opposition to all and each of the creditors, where opposition can avail, that they rarely leave any thing to be said or done by any one else; and hence, it would seem, from the practice of the court, that they were the only persons who had any right to urge such objections. It is obvious, therefore, that the main current of the practice here is not likely to be very fruitful of information on this subject.

There is a class of creditors' bills common in *England*, but of rare occurrence here, which will cast light upon this matter. Bills are often brought there by one creditor in behalf of himself and others, against executors to obtain payment, and to have the assets brought in and administered under the directions of the Court of Chancery.(*k*) In such cases the executor is not bound to plead the statute of limitations; and if he does not, the creditors will have a decree, and be paid. But it is the constant course, in the master's office, to take the objections against other creditors, and to exclude from distribution those, who, if legal objections are brought forward, cannot make their claims effectual. So too, in cases of bankruptcy—if the bankrupt waives any objection, it may still be made by the creditors; and the reason of this is, that the creditors have a direct and manifest interest in the funds, and that it should satisfy their whole claims respectively. If each of them was not permitted to make these objections, they would be left at the mercy of those, for a full defence, who, in all cases, where the fund is not more than enough to pay all the debts, have no interest in excluding any one from partaking, to their prejudice, in the distribution, however ill-founded his claim may be. And besides, such proceedings in chancery, are only to be considered as other modes of compelling payment; and the Chancellor is understood, in the distribution, to govern himself as to legal debts by the rules of law; and as to equitable debts, by the rules of equity, regarding the claim of each creditor as a suit depending; and hence, if the

(*k*) 1 Mad. Chan. 573.

executor or bankrupt fails to object or to plead the statute of limitations, it may be made or relied upon by any of the creditors; and the validity of such objections will sometimes be directed to be tried on an issue at law.(*k*)

In this State, similar principles have been held, and sanctioned in the case of *William Sluby's* estate:—in that case, Chancellor *Hanson* observes, in speaking of the liability of the real estates of deceased persons to be sold for the payment of their debts, under the act of 1785, *ch.* 72, that "no mode is prescribed by the act for establishing the debts. It is left entirely to the Chancellor's discretion. But, (he observes,) it is a rule to admit claims on such proof as is prescribed for, and is satisfactory to an Orphans Court; and even to admit claims passed against an executor or administrator by an Orphans Court, unless objected to by some person interested, viz. *by a creditor of the deceased*, or his executor or administrator; or by the guardian of the infant." The chancellor then goes on to speak of the manner in which such objections should be tried; and in substance declares, that he would not direct an issue at law for that purpose, but in extraordinary cases.(*l*)

There can be no difference, in point of equity, between the case of a creditor's bill against a deceased person's estate, and a creditor's bill, as in this instance, against an insolvent's estate. Therefore, upon principle and authority, it is competent for these originally suing creditors to make these objections, and to rely upon the statute of limitations, in opposition to these claims of the other creditors who have come in since the institution of this suit. But in applying the statute of limitations in such cases, it must be with all its saving provisoes; and also subject to the resuscitating qualifications of such acknowledgments as are deemed sufficient to take a case out of the statute; of which a statement in an insolvent's schedule may be considered as one, where the claim and schedule agree. And the statute, as in other cases, must be allowed to commence its operation from the time the debt accrued; and to run on until the creditor came in, by filing his petition, or the voucher of his claim.

The plaintiffs, by their bill, found their claim against the defendants, upon contracts made with *Henderson & Rogers;* and the

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(*k*) Ex parte Dewdney, 15 Ves. 497; Jolliffe *v.* Pitt & Whistler, 2 Vern. 694; Gifford *v.* Hart, 1 Scho. & Lefr. 409; Civil Code Napol. art. 2225.—(*l*) Ringgold *v.* Jones, ante, 88, note; Edmondson *v.* Frazier, ante, 92, note; Shewen *v.* Vanderhorst, 1 Russ. & Myl. 347; S. C. 2 Russ. & Myl. 75.

decree of May, 1822, recognises and affirms their claims of that description; and the proofs derived from competent witnesses, will enable the auditor, in fulfilment of that decree, to refer to the notes and vouchers, to ascertain the amount, and to compute the interest thereon.

But, it would be altogether without precedent to allow a plaintiff to split up his claim into parcels, and to bring separate suits for each, or after he had obtained a decree to add to the amount, and to eke out his claim indefinitely, by introducing other particulars, and causes of action of a different description, not mentioned or alluded to in the pleadings, or sanctioned by the decree, and which were only noticed in the depositions of some of the witnesses; or to bring in any additional claim by a mere *ex parte* petition, filed after the hearing and decree. If the plaintiffs had other claims than those mentioned in the pleadings, subsisting at the time of filing their bill, which might have been included therein, they should have had their bill so amended as to have embraced them, and thereby enabled the opposite party to gainsay them if he could:—therefore the account of the plaintiffs with *John Rogers* alone, and also their claim for costs in the suit against *Penelope D. Price*, must both be rejected.(*m*)

The claim of the solicitors, *Murray* and *Rogers*, which appears to have been partially sanctioned by the order of the 9th of January, 1824, may be considered as somewhat in the nature of costs; and it having been placed by the auditor's report before the party's other counsel, and all concerned, and no objection having been made, it would seem now to be proper to allow it entire; and it may be so stated by the auditor.

There is no evidence, derivable from any competent source, going to show, that the complainants ever received the money said to be due on the bonds of a Doctor *Harsnip*, which were said to have been in their hands and others:—any discount or deduction from the claim of the complainants, on that account, must therefore be rejected by the auditor.

According to the established usage and practice of the court, as has been explained, there are but two modes by which other creditors can be permitted to come in and participate, in cases of this sort; they are either by petition, or by filing the vouchers of their

(*m*) Spragg *v.* Birkes, 5 Ves. 589; 5 Bac. Abr. 668; Purefoy *v.* Purefoy, 1 Vern. 29; Hutson *v.* Lowry & Neville, 2 Virg. Cases, 42; 1825, ch. 167; Wallis *v.* Saville, 2 Lutw. 1536.

claims. But the filing of the schedule of an insolvent debtor, certainly cannot, by any strained or liberal construction of this practice, be considered as the filing of the vouchers of the claims of all, or any of those creditors, whose names and claims are stated thereon; and, laying aside the insolvent's schedule in this case, as furnishing no evidence of the intention of any creditor therein named, to come in and make a claim for any debt, which he alleged, and was ready to prove was due him, when such schedule was filed, there are but two other creditors, who have made any show of coming in as other creditors of *Rogers;* and they are, *Robert Taylor*, and the firm of *Hollingsworth & Worthington*. *Taylor* has filed a mere short copy of a judgment, which he obtained in *Baltimore* County Court against *Henderson*, the partner of *Rogers;* and *Hollingsworth & Worthington* merely say, that the only demand they now have against *Rogers*, is for twenty dollars, lent him several years ago:—but these claims are so utterly destitute of any support, by proof of any sort, that they must be rejected. There are then, in fact, no claims of any other creditors of the defendant *Rogers*, which the auditor can be allowed to state and report for confirmation.

Upon the principles before explained, *Strike* must be charged with the rents and profits, or full value of the property in question, from the date of the deeds from *Rogers* to him, to the day of the sale by the trustee. The amount, or what has been the full value during that time, must be collected and ascertained by the auditor from the proofs in the cause; and, for the reasons already given, *Strike's* claim for repairs, improvements, and advances, must be totally rejected.

The practice in the Chancery Court of this State, is wholly unlike that in the Chancery Court of England, in relation to exceptions to the depositions of witnesses. Here, the testimony having been taken publicly before the commissioners,(*n*) there is no formal order or rule for the publication of it, as in England; but when the commission is returned, it is opened by the chancellor or the register, and objections of every kind to the testimony, are taken and considered at the hearing of the cause. In this case objections have been made to the reading of the depositions of two of the witnesses, on the ground of their being interested. The proofs are all now to be sent to the auditor, upon which he is to found some of the particulars of the account he is directed to state. But

(*n*) 1785, ch. 72, s. 14.

he should not be suffered to make any statements derived from the testimony of incompetent witnesses or illegal evidence. Therefore these objections do not come now too late, and must be decided on for the government of the auditor.

The Chancellor considers it as sufficiently apparent, upon the proceedings, without going into a statement of the case, and his reasons, that *John Rogers*, the defendant, is an interested witness; and therefore, the whole of his testimony must be rejected.(*o*) The reading of the deposition of *Alexander Irvine*, has also been objected to, on the ground of his interest. It does not, however, sufficiently appear, that he was a creditor of *Rogers*, and interested at the time; and therefore the objection to his testimony must be overruled. A paper purporting to be the answer of *Strike* to a petition of the complainants filed in *Baltimore* County Court against him, has been insisted on as applicable and furnishing evidence pertinent to this case. But from its phraseology and general tenor, it is evident, that it cannot be a part of the pleadings in this suit; and without the other proceedings, to which it purports to be an answer, it cannot be evidence in this cause, and must be rejected.

With these explanations, determinations and directions, the case is referred to the auditor to state an account accordingly; and the several exceptions, as well of the plaintiffs as of the defendants, to the auditor's statements and reports heretofore made, so far as the same are inconsistent with the determinations and directions herein before given, are overruled, and so far as they may agree therewith, are sustained.

The complainants afterwards filed a petition stating, that they originally employed as their counsel *Henry M. Murray* and *Henry W. Rogers*, and agreed with them, in case of the successful termination of this case, by a final decree against *Strike* in this court, to pay them ten *per cent.* each, on the amount of the proceeds of the suit, as a compensation for their services, subject to a deduction of whatever moneys should be paid to them in the mean time, on the account of this suit; and that after the interlocutory decree was obtained, *Murray* and *Rogers* applied to *Baltimore* County Court to fix their per centage on the amount then received by the sale under the decree, while this suit was pending there, which

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(*o*) Murray *v.* Shadwell, 2 Ves. & Bea. 401.

was allowed by that court, under the impression, that those gentlemen were to proceed in the case to a final decree; upon which condition alone, was the per centage to be allowed. The petitioners further stated, that *Henry M. Murray*, soon after that order was passed, died, without proceeding further in the case, after the auditor's first report therein, and the petitioners have, in place of *Murray*, been compelled to engage *Charles Mitchell* as their counsel, who has attended to the same since; and the petitioners had alone borne all the expenses of the suit. Wherefore they prayed, that the same per centage, in proportion to his services, might be allowed to *Charles Mitchell*, as was to be allowed to *Henry M. Murray*, if he had lived, to be ascertained by this court, subject to a like deduction therefrom, of the money advanced by the complainants to him during the progress of this suit, or that this court would be pleased to prevent any further burthen of the counsel-fees in this case upon the petitioners, but that the fund may contribute thereto, under the agreement aforesaid.

17*th April*, 1826.—Bland, *Chancellor*.—The Chancellor has read and considered the foregoing petition. No objection was intimated to him, against the claim of *Henry M. Murray*, until after the argument, and the Chancellor was engaged in deliberating upon and maturing those directions, with which this case has been lately sent to the auditor. The Chancellor knows of no practice of this court, or of any analogous proceeding of the *English* court, which would authorize the introduction of claims of this sort into a cause, depending or about to be finally disposed of. The claim of the solicitors, *Rogers* and *Murray*, he sanctioned under all the very peculiar circumstances which belonged to it, and he considers the objections to it, stated in the foregoing petition, as coming now too late. The claim has been acquiesced in, and could not now be reconsidered without giving *H. M. Murray's* representatives an opportunity of being heard, which cannot now be done. The Chancellor must in all cases leave the contracts between solicitors and suitors, relative to professional services, to be settled and decided upon in like manner as all other contracts. They cannot, and ought not, to be introduced into, and blended with any pending suit. Therefore this petition must be, and is hereby dismissed with costs.

On the 4th of May, 1826, the auditor reported, that in obedience to the order of the 10th of April last, he had re-stated the

account between the estate of *John Rogers* and the trustees, applying therein the proceeds of sale, to the payment of the trustees' commission and expenses; the complainants' costs in Baltimore County Court; the costs of this audit, and the fees allowed to *H. W. Rogers* and *H. M. Murray;* and the balance of the said proceeds, then remaining, to the payment of part of the complainants' claim allowed. By this account, the complainants' claim, exclusive of the allowance to their solicitors, amounts to - - $8657 81
Proceeds of sale applicable to the payment thereof - 2750 80
Leaving a balance due the complainants of - - - $5907 01
as of the day of the trustees' sale. He has also stated an account between *Strike* and the estate of *John Rogers*, in which he has charged *Strike* with the full value of the rents and profits of the property conveyed to him by *Rogers*, rejecting entirely *Strike's* claim for advances in payment of taxes, ground-rents, &c. and has also charged him with interest thereon up to the day of the trustees' sale. This account makes *Strike* indebted in the sum of $6559 33, with further interest on $4967 63 from the day of sale; an amount more than sufficient to discharge the balance of the complainants' claim unprovided for by the account between the estate of *John Rogers* and the trustees.

To this report the defendant, *Strike*, excepted, 1st, for, that the auditor has rejected entirely the claim of the defendant, *Strike*.

2d. Because *Strike* claims the whole proceeds of the said sales of the said property, mentioned in the trustees' report, statement and proceedings, in preference to all the other claims in the said cause; and will contend that he is so entitled.

3d. Because the auditor has charged the defendant, *Strike*, with the full value of the rents and profits of the property conveyed to him by *Rogers*, rejecting entirely *Strike's* claim; and because the said rents are charged higher than is warranted in the proof of the cause.

4th. Because the auditor should have allowed the defendant, *Strike*, his advances in payment of taxes, ground-rent, and the sum assessed for the extension of *Pratt-street;* which he has not done.

5th. Because the auditor should have allowed the defendant, *Strike*, for all permanent and necessary improvements, laid out and expended, and created on said lots; which he has not done.

6th. Because the auditor has charged the defendant, *Strike*, with interest on the rents and profits of said property to the day of the

trustees' sale, which makes *Strike* indebted in the sum of $6559 33, with further interest on $4967 63, from the day of sale; which he ought not to have done.

7th. Because *Strike* is charged with the ground-rent upon the lot on *Pratt-street*, running to *Whiskey-alley;* which he ought not to have been.

8th. Because, in the said account and report, an allowance is made to *H. W. Rogers* and *Henry M. Murray*, esqr's. for fees; and also an allowance for expenses incurred by creditors at the private meetings, to consult about their private affairs.

9th. Because the said statement of account and report is erroneous in point of fact and law, and contrary to equity and right.

15*th May*, 1826.—BLAND, *Chancellor*.—This case having been submitted upon the auditor's report, and the exceptions of *Nicholas Strike* thereto, without argument, the proceedings were read and considered.

Whereupon, it is ordered, that the said exceptions to the said report, made and filed by the auditor on the 4th instant, are hereby overruled; that the said report and statements of the auditor be, and they are hereby ratified and confirmed, and that the trustees apply the proceeds accordingly, with the interest that has been or may be received. And it is further ordered, that *Strike*, one of the said defendants, forthwith pay unto the complainants the sum of $5907 01, together with interest thereon from the fourteenth day of September, in the year 1822, until paid. And it is further ordered, that the defendant, *Strike*, pay unto the complainants, all costs which have not been stated and included in the said report of the auditor, to be taxed by the register.

The defendant, *Strike*, appealed from the decree of the 28th of May, 1822; from the order of the 10th of April, 1826; and from the order of the 15th of May, 1826; and the Court of Appeals at June term 1828, affirmed them all. *Strike v. McDonald & Son*, 2 H. & G. 258.

HEWITT *v.* HEWITT.

Cruel and violent treatment of the wife by the husband, and his refusing to permit her to live with him; *held* to be sufficient ground to direct him to pay her a certain sum as alimony; the amount to be adjusted with a due regard to his circumstances. And as the several instalments became due, the payment, on petition by her, was enforced by an order to shew cause, followed by a *fieri facias*.

This bill was filed, on the 7th of October, 1825, by *Martha Hewitt*, against *Eli Hewitt*, her husband, to obtain an allowance for alimony; upon the ground, that he had treated her with great cruelty and violence, and that he had positively refused to permit her to live with him, or to provide any adequate maintenance for her, although he had a large real and personal estate, as specified in a schedule exhibited with the bill.

To this bill the defendant immediately put in his answer, admitting the facts as stated; and it was agreed, that the chancellor should pass such a decree, as he might deem proper, allowing alimony according to the schedule, which was admitted to be a correct representation of the nature and value of his estate.(*a*)

(*a*) Codd *v.* Codd.—This bill was filed, on the 17th of February, 1727, by Mary Codd, against her husband St. Ledger Codd, in which she stated, that he had not only abused her with very opprobrious language, but had treated her in an inhuman and barbarous manner; that he had by his cruel treatment deprived her of the use of one of her arms; and had abandoned her, leaving her without support, to live in a manner common to few people except slaves; and that he had altogether refused to permit her to cohabit with him, notwithstanding her most humble and repeated solicitations. Whereupon, the bill prayed, that he might be compelled to make her such an allowance and maintenance as was suitable to his station and fortune, &c.

The defendant, by his answer, denied the alleged cruel treatment, and the having deprived her of the use of an arm; and he averred, that she had broken open his trunks and closets, and had taken thence a considerable amount of personal property which she had sold for spirituous liquor to drink; that her habits were such, that he could not live with her; and he had therefore built for himself a small house near to that in which he had formerly lived with her, and which he had left her still to occupy; and that he had been, and always was willing to allow her a suitable maintenance; but that his estate was small, unproductive, &c. After which the case was submitted on bill and answer alone.

20*th May*, 1729.—Calvert, *Chancellor.*—*Decreed*, That the defendant pay to the complainant ten pounds per annum, by four quarterly payments; and it is also decreed, that he provide her a house; and that the defendant pay unto the said complainant, all her costs and charges by her in the said cause laid out and expended.—*Chancery Records, Lib. I. R. No.* 1, *page* 275, 280.

Sarah Wright's Case.—This appears to have been a bill filed by Sarah Wright, against Blois Wright, her husband, for alimony; but as the original papers are not to be found, the particulars of the case cannot be given.

3*th October*, 1730.—Ogle, *Chancellor.*—*Ordered*, That the defendant pay to the

10*th October*, 1825.—Bland, *Chancellor*.—This cause standing ready for hearing, and being submitted, the proceedings were read and considered.

Whereupon it is *decreed*, that the defendant, *Eli Hewitt*, pay unto the plaintiff, *Martha Hewitt*, or to her order, during their natural lives, so long as they shall live separate and apart from each other, the annual sum of three hundred and fifty dollars, payable half yearly; that is to say, one hundred and seventy-five dollars on the tenth day of April, and one hundred and seventy-five dollars on the tenth day of October in every year; the first payment to be made on the tenth day of April next; the same being deemed a suitable alimony, having regard to the circumstances of the parties respectively, for her support and maintenance. And in case it should not be punctually paid when demanded, the plaintiff may apply to this court to have the payment enforced. And it is further ordered, that either party be at liberty to apply, upon any future change of circumstances of the parties, or either of them, for such variation or modification of this decree as those future circumstances may indicate to be just. And it is further ordered, that the defendant pay all costs to be taxed by the register.

The plaintiff, by her petition, stated, that she still continued to live separate and apart from her husband; that by the decree in this case she had become entitled to the sum of $175, on the 10th of April last, which sum the defendant had neglected and refused to pay: whereupon she prayed, that he might be ordered to pay, &c.

15*th May*, 1826.—Bland, *Chancellor*.—Ordered, that *Eli Hewitt* pay unto *Martha Hewitt*, the sum of one hundred and seventy-five dollars with interest thereon, being the amount which became due on the 10th of April last, of the sum allowed her as alimony; or shew good cause to the contrary, on the 15th day of June next;

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complainant for her maintenance, one hundred pounds weight of tobacco per month, until answer and further order. And also ordered, that attachment issue for want of an answer.

After which, upon further proceedings being had, and on the case being brought before the court for final hearing:

5*th December*, 1732.—Ogle, *Chancellor*.—Upon reading the bill and answer, and all other the proceedings in this cause, and upon mature consideration thereupon had; it is ordered, adjudged, and decreed, that the defendant pay to the complainant for her yearly maintenance, the quantity of twelve hundred pounds of tobacco, upon the tenth day of June yearly.—*Chancery Records, Lib. No. 2, page 74, 264.*

provided that a copy of this order, together with a copy of the petition, be served on *Eli Hewitt*, on or before the 27th instant.

The plaintiff by her petition stated, that a copy had been served as required; that the defendant had failed to shew cause or to pay; whereupon she prayed for a *fieri facias;* which was ordered accordingly. The payment of other instalments of the alimony was enforced in like manner; after which the case was terminated by the death of the defendant.

HOFFMAN *v.* JOHNSON.

The principles of equity in relation to parties standing as creditor, principal debtor, and surety. Where evidences of debt are received under an agreement, that when paid, they are to go in discharge of so much, the assignee is bound to use due diligence in collecting them; and on failing to do so, to return them to the assignor.

The right to take in contiguous vacancy under a warrant of resurvey, is a privilege incident to a *legal*, not an equitable title. Where a tract of land is sold as containing so many acres, *more or less*, a reasonable allowance for small errors, &c., is to be made. But where an allowance may be claimed for deficiency, it may be made up by the vendor, by taking in contiguous vacancy under a warrant of resurvey, before he has parted with his legal title; and the vendee will be bound to receive the vacancy so added, so far as to make up the alleged deficiency.

It appears, that *Fielder Gantt* mortgaged two parcels of land in Frederick county, the one called *Fout's Delight*, and the other *The Resurvey on Beauty*, to the late *James Hunter*, who afterwards made his will, and died; that *Hunter*, by his will, directed his lands to be sold by his executors, for the payment of his debts; that his executors had the mortgages foreclosed, and afterwards sold those lands to *George Schnertzell*, and gave him a bond for a conveyance on the payment of the purchase money; that *Schnertzell* sold a part to *William Hobbs*, who sold it to *John Hoffman;* and the other part *Schnertzell* sold to *John Hoffman*, who thus obtained a claim, as assignee of *Schnertzell*, to the whole; that *Schnertzell* assigned many notes and bonds, in part payment, for which he was to be answerable; that the executors of *Hunter* are dead; and administration *de bonis non* had been granted on his estate; and that *Baker Johnson* had become seized of the legal title to those lands. Upon which, *Hoffman*, *Hobbs*, and *Schnertzell*, on the 23d of July, 1804, filed this bill, to obtain a conveyance of the legal title, alleging, that the whole purchase money had been paid. The

other material facts of the case, sufficiently appear from the Chancellor's opinion. After several abatements, by the death of parties, the case, having been revived, was at length brought to a final hearing.

18*th July*, 1826.—Bland, *Chancellor*.—This case standing ready for hearing, and no counsel appearing for the defendants, the solicitor for the plaintiffs was heard, and the proceedings read and considered.

This case, as it now stands, is much reduced in compass, but is not yet altogether free from difficulties. The first inquiry is, whether, in point of fact, the purchase money has been paid by the plaintiff *Hoffman*, or those under whom he claims; or whether, according to the principles of equity, the vendee has been altogether discharged from his responsibility, even although the purchase money may not have been entirely collected and paid.

According to the contract between the parties, the vendor was to obtain payment, in part, by collecting the amount due on several bonds and notes, assigned to him on the 23d of July, 1791; which, as was declared by the agreement, "when paid are to go in discharge of the amount of such payments." The debt due from *Chapline*, which was one of them, it is admitted, by a solicitor of the defendants, has been lately collected and paid. And it is proved, or conceded, that the whole of the purchase money has been paid, except to the amount of the debts said to be still due from *Hole* and from *Benner*. And whether or not these have been paid, or the vendee discharged from his responsibility for them, is, at present, the whole extent of the controversy as regards the purchase money.

The purchaser, in respect to these assigned debts, was placed in the situation of a surety.(*a*) It will, therefore, be necessary to advert to the general principles of equity, applicable to parties standing in the relation to each other, in which these did, of creditor, principal debtor, and surety.

According to the Roman law, a surety was allowed three advantages: 1st, he might compel the creditor to sue the principal debtor first; 2d, the creditor might be driven to resort to each surety for his proportional share only; and 3d, a surety, sued for the whole debt, might demand of the creditor to transfer over his actions against the other sureties, before he was allowed to recover the

(*a*) Anstey *v.* Marden, 1 New Rep. 124.

whole from the one sued; that is, to have it placed in his power, as far as practicable, to obtain reimbursement, by being clothed with all the powers of the creditor and substituted in his place.(*a*) These principles and privileges, it is said, have been substantially adopted by all the nations of Europe, of whose code the Roman law forms the basis; which shows that they accord very much with natural equity and the common sense of mankind.(*b*) The principles of equity, of England and of Maryland, although in most respects substantially the same, are apparently not so broad and indiscriminate in their application.

In the ordinary case of a money bond, there is no distinction, upon the face of it, between the principal and the surety; who being both debtors to the same creditor; a court of equity will rarely, if in any case, be induced to make any distinction between them, as regards their creditor. Being alike his debtors, and equally bound to him; and the credit having been given to them all together; equity never interferes with such a contract, so as to loosen any of its ligatures, unless upon peculiar and strong ground. Yet, as between themselves, such obligors, without prejudice to their creditor, may be treated, according to the fact, as principal and surety, and relieved accordingly. The surety may come into equity to compel his principal to relieve him of his liability by paying off the debt; but it is otherwise in the case of a bond of indemnity, the legal effect of which is to protect against the consequences of future deficiencies, but not to entitle the party to call for anticipated and precautionary payment, by way of preventing the risk of his being thereafter damnified.(*c*) Hence it is evident, that a case can rarely occur, under a contract in the form of a mere money bond, where one of the obligors, who may be, in fact, no more than a surety, can be considered as discharged by reason of the obligee's not proceeding against his co-obligor; or, merely because of the laches of the creditor.(*d*)

The principles of law in relation to negotiable and commercial paper, have arisen out of the peculiar nature and uses of such instruments. It has been found, from experience, every where, that it is of the utmost importance, in commercial affairs, that the holder of such paper should, without delay, give every one who has become a surety or endorser, notice of its fate. Hence the

(*a*) Coop. Just. Inst. 612.—(*b*) Hayes *v.* Ward, 4 John. C. C. 133.—(*c*) Antrobus *v.* Davidson, 3 Meriv. 578.—(*d*) *Ex parte* Rushforth, 10 Ves. 414; Coop. Just Inst. 462, 612.

holder of such an instrument is held strictly bound to use due diligence; or, on his default the surety or endorser is discharged. Cases of this kind can have little bearing on that now under consideration.

In the case of a surety for the performance of services; as, of a penal bond, the condition of which is, that one of the obligors shall faithfully perform certain work, or discharge the duties of a certain station, as a clerk, or the like; no unreasonable tardiness, on the part of the obligee, will be tolerated. In such cases, one of the obligors only is to perform the service, and if he neglects his duty, the employer alone can know it, and he alone can give notice of the neglect. Hence it is evident, that any unreasonable delay in making a claim, or a long acquiescence in the nonperformance of the services, must be considered as a waiver of the right to call for compensation; and as a tacit discharge of the surety, whose principal has been thus unreasonably indulged to his prejudice. Therefore, in this class of cases, the obligee must use due diligence in bringing suit after the cause of action has accrued, or the surety will be discharged.(*e*)

But the case now under consideration, belongs to a different class. It is one of those where the debtor places in the hands, and under the control of his creditor, the means of reaching funds, which are represented as available and adequate to the satisfaction of the demand. And the creditor, by accepting those means, tacitly undertakes to use due diligence in endeavouring to make the funds available; or to furnish evidence that they do not exist, by shewing that there was nothing in the hands of the alleged holder of them; or, that he was insolvent; and also, that, after having made every proper effort to come at such funds, he will return or reassign the bond, note, or judgment, which had been placed in his hands for that purpose. An example of this class of cases may be presented in this form: A is indebted to B, and B is indebted to C. And it is agreed, that B shall assign his claim upon A, to C, which, when paid, is to go in discharge of the debt due from B to C; consequently, by this agreement, C becomes the creditor, A the principal debtor, and B stands as the surety of A. But if it should turn out, that there is nothing due from A to B; or that A is insolvent, then the consideration of the agreement fails, and B again becomes a principal debtor to C.

(*e*) Coop. Just. Inst. 613.

In cases of this sort, the exertion of every reasonable and proper degree of diligence is within the express terms and meaning of the contract. And, after all such proper efforts have been made, before payment can be enforced from the surety, equity and justice require, that the bonds, notes, or judgments, or all the securities he had placed in the hands of his creditor, or enabled him to procure, should be returned, or reassigned, so as to put it in the power of the debtor or surety to obtain reimbursement from the funds which he had represented as sufficient, and which his creditor had shewn that he was unable to render available.(*f*) Such are the principles of equity applicable to this case: let us now review the facts.

It appears that *Hole's* bond was payable on the 23d September, 1786; that it was given to secure the payment of the purchase money of a certain lot of land, which was held bound for the payment of this debt, by an equitable lien; and, which lien there is strong reason to believe, continued unimpaired down to the year 1807. At May term, 1793, of the General Court, the assignee obtained judgment against *Hole* on this bond; on which judgment a *ca. sa.* was issued, returnable to May term, 1794, and there the judicial proceedings appear to have ended. *Hole* petitioned for the benefit of the insolvent law, in April, 1794; yet, it does not appear that he obtained a complete discharge under any insolvent law until 1802. Not even an offer has been made by the holder of this bond, given by *Hole*, at any time, to return it, or to transfer the judgment obtained on it to the vendee. From all these circumstances it is considered, that the vendee is entirely discharged from all responsibility for this debt of *Hole's*. If it has been lost, it has been owing to the laches of the vendor; and, therefore, the vendee ought not any longer to be held answerable.

The bond of *William Benner*, it appears, became due on the 1st of January, 1786; and he died on the 10th August, 1793. It was generally reported, that he was, shortly before his death, entirely insolvent; but that he left some personal estate, is certain. The vendor or assignee, brought suit on his bond, and obtained judgment against him, in the General Court, in May, 1793, on which a *ca. sa.* was issued, returnable to October, 1793. From

(*f*) Kearslake *v.* Morgan, 5 T. R. 513; King *v.* Baldwin, 17 John. Rep. 384; Hayes *v.* Ward, 4 John. C. C. 123; Eddowes *v.* Niell, 4 Dall. 133; Clark *v.* Young, 1 Cran. 192; Harris *v.* Johnston, 3 Cran. 311; *Ex parte* Mure, 2 Cox. 63; Williams *v.* Price, 1 Sim. & Stu. 581.

thenceforward, as to this claim, the proofs are silent. There has been no offer to return this bond of *Benner's*, or to assign the judgment against him to the vendee. From the lapse of time and all other circumstances, it may be presumed that this debt has been satisfied; or, if not, that it has been owing to the laches of the vendor; and, therefore, in this instance, also, the vendee is entirely discharged from all further responsibility.

Upon the whole, it thus appears, that the entire amount of the purchase money has been paid, or discharged in the manner agreed upon. And here this case might be closed, were it not, that the vendor, since he entered into this contract, has made a resurvey of these tracts of land, and included contiguous vacancy; and, that the vendee claims an allowance for deficiency in quantity. These matters must be disposed of; and they have presented the principal difficulties in the case.

Shall not this resurvey, made by the vendor, at his own expense, after entering into this contract, enure, in all respects, to the benefit of the vendee? Shall the claim of the vendee for an allowance for deficiency be sustained to the full amount, notwithstanding it has been made up, in part, by contiguous vacancy included under the warrant of resurvey? and, shall the vendor be now called on to refund, to the amount of the deficiency, not so made up by contiguous vacancy, after the purchase money has been paid? The answers to these questions must be deduced from the peculiar rules of our law relative to real estate. It does not appear, that these questions have ever before been presented for judicial investigation; the Chancellor is, therefore, without the aid of precedent.

In this case the vendor, by his bond, dated 23d July, 1791, binds himself to convey to the vendee "the tracts or parcels of land called *Fout's Delight*, and *The Resurvey on Beauty*, containing four hundred and twenty-four and an half acres of land, more or less." By a resurvey, made in April, 1792, these tracts were found to contain together no more than 384 acres; but, by that resurvey, eighteen acres of contiguous vacancy were included, making, in all, 402 acres in this resurveyed tract which was called "*The Reunion*," leaving a deficiency of 22½ acres, including the vacancy; and of 40½ acres, if that addition is to be rejected. The claim for an allowance for deficiency was first made by the supplemental bill, filed on the 15th of August, 1821; and, it is there made and designated by a reference to this return on the warrant of resurvey executed by and at the expense of the vendor.

Where lands are sold by metes and bounds, or in a body, by a designated name, number, or lot, without reference to quantity, in such cases, according to the English authorities and our own, no allowance is made for any deficiency; unless on the ground of fraud, or misrepresentation. And where lands are sold by measurement, or by the acre, no mere question as to the deficiency can arise. But where, as in this instance, the specified tract is stated to contain so many acres, more or less, difficulties often arise as to the claim of an allowance for deficiency. The precise meaning of the words "*more or less*," has been fixed by no decisions; but the better opinion seems to be, that they should be restricted to a reasonable allowance for small errors in surveys, and for variations in instruments. Something, too, will depend on the proportion the deficiency bears to the whole tract. It seems to be difficult to fix a positive rule.(*g*) But it is considered, that under all circumstances, this is a case in which there is a fair ground for presenting such a claim for deficiency; and therefore it must be investigated and decided.

It has been long settled, that every patent grant for land, from the State to an individual, binds the State to warrant and assure to the grantee, and those who claim under him, that the tract described shall contain the number of acres specified. The remuneration for deficiency in quantity is not, however, pecuniary,(*h*) or made by

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(*g*) Townshend *v.* Stangroom, 6 Ves. 340; Winch *v.* Winchester, 1 Ves. & Bea. 375; 1 Pow. Cont. 375; Land Hold. Assis. 253; Nelson *v.* Matthews, 2 Hen. & Mun. 164; Duval *v.* Ross, 2 Mun. 290.

Murdock *v.* Beall.—This was a creditor's bill, filed on the 7th of May, 1799, to have the real estate of Samuel Beall, deceased, sold to pay his debts. Sale decreed and made. The trustee reported, that he had sold the tract of land called *Exchange*, supposed to contain 8284 acres, more or less; that soon after the sale, it was discovered, that Walter Beall, who had conveyed to Samuel Beall, had retained fifty acres, for which he had made an allowance to the purchaser; but, that the purchaser had caused the land to be surveyed, and had discovered, that, in the residue, there was a deficiency of nine and a quarter acres, for which he claimed an allowance. Upon these facts the case was submitted.

17th February, 1804.—Hanson, *Chancellor*.—As the whole of *Exchange* was intended to be sold, and afterwards a discovery was made, that fifty acres thereof had been retained by Walter Beall, it was proper in the trustee to make the purchaser an allowance for the said fifty acres; because the deficiency was not of quantity, but in *Exchange* there was a defect of title. But, as to the nine and a quarter acres deficiency in quantity, the Chancellor is clearly of opinion, that the purchaser is not entitled to an allowance for that deficiency; and not being entitled to that allowance, he cannot possibly be entitled to an allowance for the expense to which he has voluntarily put himself to shew the deficiency.

(*h*) Land Hold. Assis. 421.

refunding the purchase money; but it is made in kind, in other land warrants, or by an authority to take other vacant lands any where to the amount of the deficiency.(*i*) This warranty, or implied covenant, passes with the *legal* title of the grantee to his assignee, and all those who hold the *legal* title under him; and is never extinguished until, after the amount of the deficiency having been ascertained, the legal holder has been satisfied by obtaining other land warrants, or has actually included other vacant land equal in quantity to the deficiency. Any *legal* holder, in order to ascertain the existence and extent of this claim against the State, may, of right, obtain from the land office a warrant of resurvey; and take in any vacant land immediately contiguous to the original tract. The deficiency, thus ascertained, is directly set off, in the land office, against the vacancy included; and, if the vacancy amounts to as much, or to more than the deficiency, the claim against the State is fully satisfied; but if less, then it is only satisfied in part.(*j*)

In these respects this general, but implied warrantry in every patent grant from the State, must be regarded as a peculiar, and beneficial incident, and privilege beginning, and associated with the *legal* title of the original grantee, and following that legal title from him to all others, who claim under him, until it has been separated, and complete satisfaction has been obtained by a holder of the legal title.(*k*)

In this case, these tracts of land were deficient in quantity, and this incidental claim against the State, and the privilege of including contiguous vacancy, subsisted in full force at the time the contract was entered into between these parties. The vendor stipulated to make a good and legal title to these tracts; tacitly, but clearly, including all incidents and privileges associated with the *legal* title. The vendor cannot be allowed to withhold any, then subsisting, beneficial incident to the legal title; nor can the vendee be allowed to relieve himself from any burthen or responsibility by rejecting any incident to the title he contracted to receive.

It is one of the chief purposes of a warrant of resurvey, issuing from the land office, to ascertain the existence and extent of this implied warranty; and, where a deficiency exists, to make it up by taking in contiguous vacancy. It is true, that under such a warrant, the party may take in any contiguous vacancy, not only

(*i*) Land Hol. Assis. 473.—(*j*) Land Hol. Assis. 319, 468, 480, &c.—(*k*) Land Hol. Assis. 153.

to the amount of the deficiency in the original tract, but to a much greater extent. Whether the vendor can be permitted, considerably, or in any degree, to enlarge the tract of land by a resurvey after the contract of sale is entered into, and can compel the purchaser to take and pay for such addition, is another and a very different question from that under consideration; and one which it will not now be necessary to determine.

But, in this case, the vendor, after ascertaining the deficiency, has supplied it, only in part, by the addition of contiguous vacancy. This mode of making up the deficiency subsisted as an incident to the legal title at the time the contract was entered into by these parties. The vendee, therefore, cannot be now permitted to reject this incident, and claim a deduction for these acres of vacancy, leaving the vendor to hold them as his separate estate. If the vendor were not allowed, in this way, to make up the deficiency, then the vendee would obtain the original tract together with, or divested of this privilege of including these eighteen acres of contiguous vacancy. In the first case, he might obtain them, by means of his legal title, without paying for them; or on the other hand, the vendor might have cast upon him a small inconvenient scrap of land, which, from its situation, would be alike unsaleable and unprofitable, unless in connexion with one or other of the immediately adjacent tracts. But these eighteen acres have been obtained from the State by the vendor as the holder of the legal title to the original tracts, by virtue of a privilege incident to that title, and as immediately contiguous to those tracts; they must, therefore, pass from the vendor to the vendee as connected with, and parcel of those tracts; and consequently, these tracts are not, so far, deficient.

As to the residue, or the deficiency of twenty-two and a half acres, it is now too late to claim an allowance for them, after the whole amount of the purchase money has been voluntarily and fully paid. Under all the circumstances of this case, the vendor cannot now be called on to refund any part of the purchase money.

It appears, that the equitable interest which *George Schnertzell* had obtained from the holders of the legal title has been fully and entirely transferred to, and is now vested in *John Hoffman*, one of the plaintiffs. And the representatives of the parties to the original contract, having been all of them made parties to this suit:

Decreed, that the defendants, by a good and sufficient deed made, executed, and acknowledged according to law, transfer and

convey unto the plaintiff, *John Hoffman*, his heirs and assigns, in fee simple, all those several tracts of land in the proceedings mentioned, called "Fout's Delight," and "The Resurvey on Beauty," and all their interest in that other parcel of land included by a warrant of resurvey on those tracts under the name of "The Reunion." And it is further *decreed*, that *Henry Hoffman* is hereby constituted and appointed trustee, under the last will and testament of the late *James Hunter;* and that he, by a good and sufficient deed, executed and acknowledged according to law, convey unto the complainant, *John Hoffman*, all the legal title of, in and to the said tracts of land. And it is further *decreed*, that the defendants pay unto the complainants their costs, to be taxed by the register.

BURCH *v.* SCOTT.

Where a party admitted, that he had obtained a decree by default for more than was due; and did not allege, that he had since lost any of his testimony; and it appeared that the defendant had negligently omitted during a space of about five months to put in his answer; but averred by bill on oath, that he had a good and available defence on the merits; the decree was set aside, and the defendant let in to answer on payment of costs.

All orders and decrees in Chancery may be altered, revised, or revoked during the term at which they have been passed, on motion or petition; but after the term, the party can only obtain relief by original bill or bill of review.

Relief against a decree obtained by fraud can only be obtained by *original* bill, not by a mere bill of review.

A decretal order, in England, is most commonly that which is drawn up as the substance of, and as preparatory to a final decree; and it may in some respects be enforced as a final decree. Here no such decretal order is ever made.

A bill of review lies after the decree is signed and enrolled, and it is considered as enrolled after it is signed by the Chancellor and filed by the register.

Restrictive orders staying the court's own decrees treated as injunctions.

A bill of review, or the like, does not of itself operate as a suspension of the execution of the decree complained of.

It is stated in the bill, which was filed on the 14th of July, 1823, that in the year 1803 *Jesse Burch* died intestate, and that administration on his personal estate was granted by the Orphans Court of Washington county, in the District of Columbia, to his widow, *Jane Burch*, who took possession of his personal estate accordingly: among which personalty were three negro slaves, as mentioned in the inventory returned by her; that since the death of the intestate, *Jesse*, those negroes had several children; that

the administratrix, *Jane Burch*, having died intestate, letters of administration on her personal estate were granted by the Orphans Court of Washington county, in the District of Columbia, to *Thomas Burch;* and on the same day, and by the same court, administration *de bonis non* of the effects of the late *Jesse Burch*, was granted to the same *Thomas Burch;*(*a*) that it had not been found necessary to make sale of those negroes to pay the debts of the late *Jesse Burch;* but, owing to the conduct of one of the sureties in the administration bond, *Kinsey Gittings*, they remained as a part of the surplus of his personalty to be distributed among his next of kin; that those negroes, with their increase, had been taken out of the possession of the late administratrix, *Jane Burch*, by *Kinsey Gittings*, and held by him during his life, and after his death had passed into the possession of *William Scott*, "who claimed to hold them in virtue of letters of administration granted to him upon the estate of *Kinsey Gittings*," and he had actually sold them in October, 1818, and received payment for them, amounting, as appears by his return of the sales, to $2850; "which, with interest and a reasonable compensation for their services while in his possession, and in the possession of *Gittings*, the plaintiffs were justly entitled to demand of this defendant; that the defendant was about to distribute the money so received by him as a part of the assets of his intestate *Gittings*."

Upon these circumstances this suit was instituted by *Thomas Burch*, as administrator *de bonis non* of the late *Jesse Burch*, and in his own right, together with *Jesse Burch*, *Fielder Burch*, *Mildred* with her husband *James Johnson*, and *Kitty* with her husband *John Stephens;* which *Thomas*, *Jesse*, *Fielder*, *Mildred*, and *Kitty*, are the children, and next of kin of the late *Jesse* and *Jane Burch*, against *William Scott* alone. The plaintiffs prayed to have the defendant, *Scott*, considered as a trustee for their benefit; that a distribution of the negroes, or the proceeds of the sale, might be made among them; and that the defendant might be restrained by injunction

(*a*) Upon letters granted in the District of Columbia, the executor or administrator is, by the act of 1813, ch. 165, authorized to sue here; although upon such letters granted here, he cannot sue there, 1 *Cran.* 259. But no suit can be sustained here by any one, on letters of administration granted in a foreign country; 1 *Hayw.* 355; 3 *Bac. Abr.* 36; *Milf. Pl.* 155,; *Mollinson v. Bowley, MS.* 1806; or in any one of the States of this Union, 3 *Cran.* 319; 9 *Cran.* 151; *Kirk v. Brown, MS.* 1818. But the act of 1815, ch. 149, s. 4, authorizes the revival of an action at common law *against* an executor or administrator, to whom letters have not been granted here, and who "resides out of this State."

from parting with, or paying over the proceeds of the sale of those negroes.

An injunction bond was filed; but, from its not having been, as usual, noted as approved by the Chancellor, it would seem to have been deemed unnecessary in this case. An injunction was granted, issued, and served. A *subpœna* was issued returnable to September term, 1823, and returned served. The defendant not appearing, an attachment was issued returnable to December term, 1823, and returned attached; and it was then renewed and returned attached to March term, 1824, when the following order was passed.

30th March, 1824.—Johnson, *Chancellor.*(*b*)—In this cause the defendant being returned attached for not appearing to the bill of complaint filed by the complainants; and the said defendant not having appeared, upon motion of the complainants by their solicitor; it is this 30th day of March, 1824, *ordered*, that the said defendant, either in person or by his solicitor, put in a good and sufficient answer to each interrogatory contained in the bill, or a plea or demurrer to the same, on or before the 4th day of July term next of this court, or otherwise the Chancellor, upon application of the complainants, and at discretion, will either take the bill *pro confesso*, or direct a commission to issue for taking depositions, and will finally decree as to him shall seem meet and consistent with the established principles of equity, in the same manner as if the said defendant had appeared and depositions had been taken in the usual way. Provided a copy of this order be served on the said defendant, or left at his usual place of abode, before the 20th day of June next.

After which, this order having been returned served, the case was brought before the court for further proceeding.

8th July, 1825.—Bland, *Chancellor.*—The bill having been taken *pro confesso*, on motion of the complainants' counsel, it is ordered, that a commission issue to *Zadock Magruder* of Montgomery county in this State, and also to *John A. Smith*, of the city of Washington, to take testimony in the cause.

The commission to *Smith* was returned with testimony, and filed on the 3d of August, 1825, and that to *Magruder* was returned with proofs and filed on the next day.

(*b*) The terms and form of this order were adjusted, by Chancellor Hanson, according to the provisions of the act of 1799, ch. 79, s. 2; in the case of Walsh & others *v.* Delassere & others, 19th February, 1800, and it has been followed ever since.

4th August, 1825.—BLAND, *Chancellor*.—Ordered, that this case be, and the same is hereby referred to the auditor, with directions to state an account from the proceedings, shewing the hires of the said negroes, with which the said late *Kinsey Gittings* was chargeable, from the time they came into his possession and were demanded of him, until they were sold by his administrator, and the amount of sales of said negroes, and the interest thereon from that time.

The auditor on the same day made a report, in which he says, that he had stated an "account shewing the amount of sales of the negroes, and the interest thereon from the time they were sold; but that he finds nothing in the proceedings from which he can state an account shewing the hire of the said negroes, with which *Kinsey Gittings* was chargeable from the time they came into his possession and were demanded of him, until they were sold by the defendant as his administrator." Upon which the case was immediately submitted without argument.

4th August, 1825.—BLAND, *Chancellor*.—*Decreed*, that the report of the auditor be confirmed, and that the defendant, *William Scott*, forthwith pay to the complainants, or bring into this court to be paid to them, the sum of $4006 15, with interest on $2850, part thereof, from the fourth day of August, 1825, until paid or brought in as aforesaid.

On the 22d of September, 1825, the plaintiffs, by their petition, applied for a *fieri facias*, which was immediately ordered and issued to the sheriff of Montgomery county, which writ was endorsed thus, "complainants release Doll. 392 90½."

On the 15th of November, 1825, *William Scott*, together with *Berry Gittings*, *Michael Gittings*, *Richard Gittings*, *Sarah Gittings*, an infant by her guardian and next friend, and *Jeremiah Gittings*, also an infant by his guardian and next friend, filed a bill, which they style, "their supplemental bill in the nature of a bill of review," in which they recite all the proceedings in the before mentioned case.

They state and object to those proceedings and the decree thereupon, that under the commission to *Smith*, three witnesses were examined, who "according to the tenor of the return were no otherwise sworn, but severally and respectively to depose and testify according to the best of their knowledge and belief, and are

not authenticated by the signature of the witnesses;" that by the return of the commission to *Magruder*, it appears that one witness was examined, not on oath, but on affirmation, neither the form, nor the terms of which are set forth, nor has the witness signed his deposition; that this plaintiff, *William Scott*, is the administrator of the late *Kinsey Gittings*, and the other plaintiffs are his children and next of kin, who as such are the persons really and exclusively interested in the matter in controversy, and ought to have been made parties to the suit, in which the decree of the 4th of August, 1825, was passed. Instead of which this plaintiff, *William Scott*, alone was made defendant and charged by the decree, in that case, in his own proper person, although he could only be held liable, if at all, as administrator of the late *Kinsey Gittings*, being as such no more than a trustee for his creditors and next of kin.

They further state, that, from certain judicial proceedings and other circumstances, it appeared, that this plaintiff, *William Scott*, was entitled to various credits, which had not been given, and an *ex parte* decree had been obtained by *Thomas Burch*, and others, in that case, for a sum greatly exceeding their just due, by their fraudulently concealing the proper sets off and deductions, some of which they had all along admitted, and others were clear and indisputable.

And they further state, that this plaintiff, *William Scott*, was frequently, and contrary to his anticipations and expectations, disappointed in having the business put in train for a decision; he at length became so anxious and uneasy on the subject, that, hearing of his counsel being in attendance at the Court of Appeals at Annapolis, at the June term of 1824, he came from his home in Montgomery to Annapolis, for the express and only purpose of having an interview with his counsel, and getting his answer drawn, and filed, &c. But he found his counsel on the eve of returning to Washington, whither he accompanied him, and immediately on their arrival, the answer was drawn, regularly sworn to, and put into the hands of his counsel, to be transmitted by the stage next morning, to the register of this court; that he had frequent interviews afterwards with his counsel on the subject; he as well as his counsel, took it for granted, the answer and exhibits had been duly received; and he was informed by his counsel, that he had made an arrangement with *Mr. Key*, one of the opposite counsel, who resided in Georgetown, to fix upon some day convenient for them both, to go to Annapolis and argue the cause; and

this plaintiff, *William Scott*, remained under this impression, without the slightest intimation of the answer's having miscarried, till, to his utter astonishment, he found there had been a decree against him, followed by execution: and when he communicated to his counsel the fact of his property having been seized by the sheriff, he was utterly at a loss to comprehend how it could have been brought about; having only heard, a short time before, of the miscarriage of the answer, and not dreaming that there could have been a decree, till writing to the register of this court for information, he was certified of the fact.

Walter Jones, the counsel of *William Scott*, in an affidavit made by him and filed with this bill, confirms what is stated by *Scott*, as to his being called on at Annapolis, and followed to Washington, where he states, that *Scott* remained with him until he had drawn his answer, and it was sworn to by him, before a magistrate;—that finding the package so large as to make the transmission of it by mail very expensive, he, *Jones*, sent his servant to the stage office to inquire whether there were any passengers for Annapolis in the stage of the next day; who returned with an answer, that he had found a gentleman who would take charge of the packet; upon which he delivered it to him very securely sealed up, and directed to the Register of the Court of Chancery at Annapolis; with a note, requesting him to file the answer, &c., and enter a notice to dissolve. He does not recollect that his servant named the person to whom he delivered the packet; if he did, he has forgotten it. He had frequent conversations afterwards with *Mr. Key*, about appointing a day mutually convenient for them both, to go to Annapolis to argue the cause. He rested without doubt or apprehension of the answer's being regularly filed, and does not remember when he experienced so great a surprise, as when he heard of the decree in the cause.

These plaintiffs, by this bill, pray, that this plaintiff, *William Scott*, may be permitted to put in his original answer, plea, &c. to the original bill, &c., and that these other plaintiffs may be admitted as parties to the proceedings, as they are parties in interest, and to answer and defend, &c.; that the case may be heard upon all and singular the allegations, matters and things in this their supplemental bill, in the nature of a bill of review, alleged and contained, at the same time, that it is re-heard upon the original bill; that these plaintiffs may be restored to their original situations respectively, before the issuing of the commission and the making of the

said decree; that the said decree may, by the order of this court, be opened for such re-hearing; that the execution of the same may be suspended, and the said *fieri facias* countermanded by the like order of this court; and that in general they may be relieved according to the equity and nature of their case, &c. And in conclusion, a prayer for *subpœna* against the plaintiffs to the original bill, &c., and an order of publication against those of them who are non-residents.

16*th November*, 1825.—Bland, *Chancellor*.—On hearing the complainant's counsel, and considering the aforegoing bill, together with the affidavit of the complainant's counsel therewith filed; and the said *William Scott* having filed his bond with surety, approved by the Chancellor, to abide by, and fulfil the order of this court in the premises:—it is ordered, that *subpœnas* issue, and publication be made, as prayed by the said bill. And it is further ordered, that all further proceedings, in execution of the said decree of this court, of the fourth day of August last, be, and the same are hereby enjoined, suspended and countermanded, until the further order of this court, as prayed by the foregoing bill.

On the 3d May, 1826, the defendants, *Thomas Burch* and others, filed their answers, in which they admit, that their counsel had been informed, shortly after the serving of the order of the 30th March, 1824, that *William Scott* had filed his answer, and that it had been proposed, that a day should be fixed on to go to Annapolis to try the cause; that their counsel wrote for a copy of *Scott's* answer, and was informed that it had not been filed, which information he communicated shortly afterwards, to *Mr. Jones*, the counsel of *Mr. Scott;* that the same fact was again, after a considerable interval, communicated to *Mr. Jones*, and also to *William Scott* himself. And they further admit, "that there ought to have been a credit entered for the sums mentioned in the decree of the Orphans Court of Washington county, and which were to be returned to *Kinsey Gittings*, on his giving up the property; or rather, that the defendants were willing to admit a credit for those sums, though, as they were tendered to *Gittings* in his lifetime, and also to *Scott*, since his death, when the negroes were demanded of him, and compliance with the said Orphans Court's decree required, and they refused then to receive the same and give up the negroes, and have since put the defendants to very great expense in recovering their claim, they might well have been justi-

fied in refusing to allow such credit. And they state, that a credit for $392 90, the amount of those two sums, and interest upon them, was endorsed on the *fieri facias*, issued on the said decree, and the balance only was required to be made by the said execution, which balance they aver they are justly entitled to, and that no other deduction or discount ought to be allowed against the amount of the claim, as stated in the said decree." And they further deny all fraud, &c., as alleged in the bill, &c.

These defendants, *Thomas Burch* and others, by their petition allege, that the plaintiffs, *William Scott* and others, had issued no *subpœnas*, nor applied for any order of publication against these defendants, who are nonresidents, as prayed by their bill; that they, on learning that such a bill had been filed, have answered thereto; and now pray, that the order of the 16th November, 1825, may be revoked.

4th May, 1826.—Bland, *Chancellor*.—On the foregoing application it is ordered, that the order of the 16th of November last be dissolved and revoked, unless cause to the contrary be shewn on the fourth day of the next term. Provided a copy of this order, together with a copy of the foregoing petition, be served on the complainants or their solicitor, on or before the first day of June next.

A copy of this order having been served as required, the case was afterwards brought before the court for its determination.

25th July, 1826.—Bland, *Chancellor*.—This case standing ready for hearing, on the notice given in pursuance of the order of the 4th of May last, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

The Chancellor feels every disposition to relieve this case from all embarrassing forms, and to reach its merits, if practicable. It will, therefore, be necessary to disengage the complainants' substantial equity and object from the forms with which they have been clothed; and to examine their bill with a due regard to their equity and object. The substance of their complaint is, that a decree has been obtained against one, which materially affects all of them, erroneously; by fraud; by surprise; for much more than is due; or, to say the least, improperly and to the exclusion of a good and available defence. And upon the truth of these allegations, they ground their equity to have the decree of the 4th of August last set aside, their undenied credits allowed, their defence let in, and the matters in

controversy heard upon the merits. This is the object, and the mode chosen by them to attain it, is, by what they call "a supplemental bill, in the nature of a bill of review." Whatever may be the cause of complaint, the party asking relief must conform, at least in substance, to prescribed rules as to time and manner.

It has been the long established usage and law of the Court of Chancery, to consider all its orders and decrees, as completely within its control and open to be altered, revised, or revoked during the whole term at which they are passed, on motion or by petition. But, if the term is suffered to elapse, the party can only obtain relief by original bill, or by a bill of review.(*a*) This law of this court is analogous to that which has been adopted by the courts of common law; and which has been found alike salutary in both. It is believed there is no decision of the Court of Appeals, which has directly or distinctly restricted or altered this rule of the Court of Chancery. But in this case, the bill of these plaintiffs was not filed until long after the close of the term at which the decree was signed. It cannot, therefore, be considered as entitled to the same indulgence, or as standing altogether on the footing of a petition, for a re-hearing, or alteration, or opening of a decree, filed during the term at which the decree was signed.

This bill charges, that the decree of the 4th of August last was obtained by fraud. It is the peculiar province of this court to grant relief in all cases against fraud and accident, not within reach of the courts of common law; and a decree obtained without making those parties, whose rights are affected by it, is, as to them, fraudulent.(*b*) And there can be no case of fraud, in which it would be more fit and proper for this court to interfere, than upon a charge, that its own decree had been obtained by fraud. Such a case is, however, brought before the court, not by a bill of *review*, but by an *original* bill.(*c*) And in that light, the allegations of this bill require the court, in some respects to consider it.

In the Court of Chancery of *England*, the Chancellor, it seems, after the hearing, pronounces the substance of his decree orally,(*d*) minutes of which are taken down by the register, who afterwards draws them out into the form of a decretal order; and if, in doing so, any mistake should occur, the execution of the order may be

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(*a*) Mussel *v.* Morgan, 3 Bro. C. C. 74; Cameron *v.* McRoberts, 3 Wheat. 591.—(*b*) Giffard *v.* Hort, 1 Scho. & Lefr. 386.—(*c*) 1 Mont. Dig. 345.—(*d*) Kennedy *v.* Daly, 1 Scho. & Lefr. 384; Giffard *v.* Hort, 1 Scho. & Lefr. 396.

stayed awhile, until it can be corrected by motion in court. As thus drawn up, this judgment of the court is always called its "decretal order." But it has the force only of an interlocutory order; and is not a perfect, complete, and final decree before enrolment; for, till then the Chancellor may re-hear, alter, or revise it. The proper officer draws up the form of the decree for enrolment, from the decretal order, reciting all the pleadings, &c.; after which a fair copy is made upon parchment, and signed by the Chancellor. It is then, and not until then, an enrolled and final decree. The interval of time suffered to elapse, between the making of the decretal order, and the enrolment, is seldom less than a month, often more, and in some cases exceeds a whole year. But in this interval the decretal order is so far considered as a final decree, that it may be enforced by attachment.(*e*)

The Court of Appeals have declared, that "the decree of the Chancellor is subject to his control, only upon a bill of review, or a bill in the nature of a bill of review. A bill of review lies after the decree is signed and enrolled. A bill in the nature of a bill of review lies after the decree is made, but before enrolment. *A decree must be considered as enrolled, after it is signed by the Chancellor, and filed by the register.*"(*f*) But the Chancellor rarely, if ever, pronounces his decree orally, as in *England*, or if he does do so in any case, no minutes of it are taken down. He is considered as having pronounced no judgment; nor as having made any decision in the cause, until a decree is drawn up in writing, in full and proper form, and signed by him. That decretal order, which, in *England*, always precedes the enrolled or final decree, is never made here, and is unknown to our practice. But in *England* the phrase "decretal order," is often applied to various other orders besides that which immediately precedes the decree; and it is sometimes applied in the same sense here.

The plaintiffs have styled this bill, "their supplemental bill, in the nature of a bill of review."(*g*) But one of them was the *defendant*, and the others were no parties to the original bill, upon which the decree complained of, had been passed; and it is attached, as an addition, to no other bill; nor does it purport to supply the

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(*e*) Gilb. For. Rom. 162; 1 Harr. Pr. Chan. 77, 620; 2 Harr. Pr. Chan. 174; 2 Mad. Chan. 461; 2 Fow. Ex. Pra. 161.—(*f*) Hollingsworth *v.* McDonald, 2 H. & J. 237; Beams' Ord. 1; Digges's lessee *v.* Beale, 1 H. & McH. 71.—(*g*) 1 Mont. Dig. 318.

defects of any original bill. It is, therefore, in no sense, properly and alone, a *supplemental bill.*(*h*)

In *England*, a bill of review can only come in after the decree has been perfected and enrolled. But if the party discover any error, or new matter of fact after the decree has been pronounced, and before it has been enrolled, he may obtain relief by *a bill in the nature of a bill of review;* and need not wait, or go to the expense of having the decree enrolled. Now, from what the Court of Appeals have said, as we have seen, it clearly follows, that, in this State, there can be no such thing as *a bill, in the nature of a bill of review:* since all decrees here are made by being signed and filed; and when so made, are to be considered as decrees enrolled. Most clearly such a bill cannot be resorted to in this case.

A bill of review, properly so called, lies *against* those who were parties to the original bill, and *against them only;* and must be either for error apparent on the face of the decree, or for some new matter.(*i*) But before a bill of review, for newly discovered matter, can be filed, the party must petition for leave to do so; setting forth the new matter, strongly sustaining his statement by affidavits; upon which the leave of the court is granted. In this case there has been no petition, setting forth newly discovered matter, nor any leave given to file such a bill. This bill, therefore, can, in no respect whatever, be considered as a bill of review, grounded on the discovery of new matter.

A bill of review for error apparent on the face of the decree, may be filed without asking, or obtaining the leave of the court; and it may be brought by either of the parties to the original bill alone; or it may be filed by a person not a party to the original decree, but whose rights are injured by it. Such is the case now before this court. The bill of these plaintiffs has this character; and more.

This bill has yet another aspect. It alleges, that the plaintiffs, one of whom was a party to the original suit, had a good and available defence; that all of them should have been made parties; that they have, all of them, an interest which they will be able to maintain and prove; and that the decree of the 4th of August last was obtained by surprise, for a greater amount than was actually

(*h*) 1 Mont. Dig. 315; 2 Mad. Chan. 519; 1 Fow. Ex. Pra. 61.—(*i*) 1 Mont. Dig. 330; 2 Mad. Chan. 537.

due; or owing to a kind of negligence for which they are not at all blamable, or for which they may, at least, be excused. Upon these grounds they pray to have the decree opened and the cause re-heard. According to the *English* authorities, if the enrolment of a decree be obtained by surprise, or irregularly, it may be opened; provided, the application be made within a reasonable time. And where the merits of the case had not been entered into, an enrolled decree has been set aside upon special circumstances, notwithstanding the proceedings were strictly regular. For a court of equity will make every effort, within its power, to reach the merits of the case, and have justice done.(*j*)

This bill, then, divested of all extraneous matter, may be regarded in three distinct characters: first, as an original bill, to have the decree of the 4th of August last reversed on the ground of fraud, because it injuriously affects the interests of some of these complainants who were not parties to it; secondly, as a bill of review for error apparent on the face of the decree; and thirdly, as a bill, grounded on the peculiar circumstances, asking to have the decree by default set aside, and the case re-heard upon the merits.

It was in these characters, that it presented itself to the mind of the Chancellor, when it was first laid before him. He then felt, as he still does, a strong impression, that these different characters and alternative aspects, and prayers, were so entirely incompatible, as to be incapable of being blended together in the same bill:(*k*) but he conceived, that if it could be sustained in all, or any of them, the parties complaining would be entitled to relief. And, under this impression, it seemed to him fit and proper, to suspend, at least for a season, the execution of the decree, until these matters could be more carefully canvassed, and both parties could be heard. And therefore it was, that he passed the order of the 16th of November last; which operated as an injunction, and was intended so to operate.(*l*)

(*j*) Kemp *v.* Squire, 1 Ves. 206; 2 Mad. Chan. 465.

(*k*) Perry *v.* Phelips, 17 Ves. 176.

(*l*) Restrictive orders, staying the execution of the court's own decree, so common in England, have always there, *Edin. Inj.* 209, as here, been considered as injunctions, and been treated accordingly, *Norwood v. Norwood, MS.* 1808.

Clapham *v.* Thompson.—This was a bill to account, &c., filed on the 22d of September, 1787, praying for relief, and also for an injunction to stay a sale under a *fieri facias* from this court. Upon which was passed the following order.

22*d September*, 1787.—Rogers, *Chancellor*.—On the bill of complaint exhibited in this court by Josias Clapham and Mary Carey, against Cornelius Thompson, John

But in the course of the argument, the one party seemed to construe this order as a total revocation of the decree of the 4th of

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Thompson, and Ann McDonald—it is ordered by the Chancellor, according to the prayer of the said bill, that the sales of the property of the said Josias Clapham and Mary Carey, taken by the sheriff of Frederick county, by virtue of a *fieri facias* issued from this court in the names of Cornelius Thompson, John Thompson, Angus McDonald and Ann his wife, against the lands and chattels of the said Josias Clapham and Mary Carey, and advertised for sale on the twenty-fifth instant, be stayed; and that the sheriff of Frederick county forbear and desist from making any sale of the said property, or any part thereof, until further order of the Chancery Court. And it is further ordered, that the depositions of witnesses, taken before a single magistrate, be received in evidence in this cause, upon giving five days' notice to the adverse party.

Some time after which, the depositions of sundry witnesses having been taken, the case was again brought before the court.

June, 1789.—Rogers, *Chancellor*.—Ordered, that an account be stated and taken between the parties; and that commission issue to Randolph B. Latimer and Robert Denny, as auditors, to state and take the said account; and that the said auditors apply to this court for instructions in adjusting the said account, as occasion may require.*

And the cause so standing continued until December court, seventeen hundred and eighty-nine, a commission issued to the said auditors to state, settle, and adjust the said account. The commission, with certain annexed accounts, were afterwards returned to the court here, and are contained in the words and figures following, to wit:—

"*Maryland, sct.*—The State of Maryland to Randolph B. Latimer and Robert Denny, Esquires, of Ann Arundel county, Greeting:—Know ye, that we have appointed you to be our commissioners to audite, state, settle, and adjust all accounts in a certain cause depending in our Court of Chancery, between Josias Clapham and Mary Carey, complainants, and Cornelius Thompson, John Thompson, and Anne McDonald, defendants: We therefore require you to state, audite, settle and adjust all accounts relating to the matters in dispute that shall be produced to you, by either of the parties; and that you reduce to writing such accounts as shall be stated and settled by you, and the same you send, together with this our commission, under your hands and seals, with all convenient speed, to our High Court of Chancery.—Witness the Honourable Alexander Contee Hanson, Esq., Chancellor, this second day of February, Anno Domini 1790.

Samuel H. Howard, *Reg. Cur. Can.*

Under and with this commission, the auditors stated and returned an account. And the cause so standing continued until May court, one thousand seven hundred and ninety, it was ordered that the following entry be made, to wit:—Notice of motion to confirm the auditors' return, and dissolve the injunction *nisi* the thirteenth day of July next.

After which, there being no exceptions filed to the auditors' return, on the 17th August, 1790, *decreed*, that the auditors' return be confirmed; that the *injunction order* be dissolved; and that the defendants be permitted to proceed on their *fieri facias* for a certain amount.—*Chancery Proceedings, Letter D.*, 1790, *pages* 424, 483.

* In cases of payments made in bills of credit, it was declared, that the Chancellor might appoint his *register or other person* to state and adjust the claims, and to strike the balance. June, 1780. ch. 8, s. 17.

August last; and the other, as a mere stay of execution, because of some credits not having been given. It was also urged, that the allowing of such a bill of review to be filed, did, of itself, operate a suspension of all further proceedings, until the final hearing; and that it must be so understood, when taken in connexion with the prayer of the bill, and the circumstances of a bond having been required and accepted. The Chancellor has been misunderstood.

According to the *English* law, neither the filing of a petition for re-hearing; nor a bill in the nature of a bill of review; nor a bill of review for error apparent on the face of the decree; nor a bill of review for new matter, after leave given;(*m*) nor an original bill, to set aside a decree on the ground of fraud; nor a bill to open an enrolled decree, and let in the merits, has ever, or under any circumstances been considered, *in itself*, as a suspension of the execution of a decree. The party having the decree, in all such cases, is allowed to proceed, unless specially and expressly restrained; which is never done but on the sum decreed being brought into court, or on good security being given. Similar law and practice has been long established here; and, hence it was, that the Chancellor required a bond with approved surety, to be filed before he imposed the restriction or injunction, expressed in the order of the 16th of November last.(*n*)

If, on considering this bill in its third character, there should be found sufficient cause for opening the decree, and having the case re-heard upon its merits, it will be most advantageous to all parties, that it should be done now: And it will be unnecessary to inquire, and express an opinion, whether the three characters of this bill

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(*m*) Mitf. Pl. 88.

(*n*) Mitf. Pl. 89.

CARROLL *v.* PARRAN.—February, 1733.—Bill of review—*subpœna* issued.—Upon motion of the defendant's counsel, that the bill be dismissed—*ordered*, that the said bill be dismissed with costs; leave not being given either by petition or motion to file such bill of review.

Daniel Dulany, on behalf of Charles Carroll, moves the court, that he may have leave to file a bill of review against Parran, and that a bond with good security, payable to John Parran, may be lodged in court by the said Carroll to stay execution of the same decree.—*Ordered*, that a bill of review be filed, and that no execution issue upon the former decree.

Upon motion of Samuel Young, of counsel with the defendant,—*Ordered*, that he have leave given to answer until next court.—*Chancery Records, Lib. I. R. No. 2, pages 543, 643.*

are not incompatible, particularly as no objection to it has been made on that ground; or whether the decree has been obtained by fraud or not; or is erroneous upon its face. The decree of the 4th of August last, now complained of, was obtained in that suit by the default of the defendant, in not filing his answer within the time prescribed by the rules of the court. This apparent negligence the present plaintiffs, by their bill, have endeavoured to account for, to justify, or to excuse. And whether they have done so or not, is the matter now to be ascertained: if they have, this decree must be opened.

The decree was signed as of July term; and, as has been observed before, all decrees and orders of the court being held entirely subject to its control during the term, if an answer had come in at any time previous to the close of that term, the decree by default would have been set aside, and the defence let in.(*o*) No decree by default, under the rule, will be signed until after the first four days of the term; but after that an answer may be filed, and the decree rescinded, at any time before the first day of the next succeeding term.(*p*) On turning to the proceedings, in the origi-

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(*o*) When this opinion was delivered there were, as it appears there had always been, four regular terms of this court, in each year, for the return of process, &c. But the continuance of the *sittings*, which in this and all other similar cases, is spoken of as the *term*, was irregular and indefinite. When it was presumed, that all the cases, ready for hearing, had been called up, the *sittings*, or as they have been most usually called, the *terms*, were closed, by a memorandum to that effect entered upon the docket, by order of the Chancellor. This was attended with inconvenience; for although the Court of Chancery has terms, it is not, in the sense of the common law, a term court; but is always open, (1 *Rep. Ca. Chan. Earl of Oxford's case*, 6. *Crowley's case*, 2 *Swan*, 11.) I therefore deemed it proper, that the rules might be better understood and enforced, and for the despatch of business, to fix by the rule of the 28th of April, 1827, the *close* as well as the commencement of the *sittings* of each term.

(*p*) CLAPHAM *v.* CLAPHAM.—This was a bill filed on the 9th January, 1810, to foreclose a mortgage and have the property sold. It stated, that the defendant was not a resident within the State, and prayed publication, which was ordered and made.

4th October, 1810.—KILTY, *Chancellor*.—Upon the argument that took place at the present term, respecting the above suit, the Chancellor is of opinion, that it comes within the provision made by the 9th section of the act of 1799, ch. 79, and that he is authorized to take the bill *pro confesso*, although he has also by the terms of the act a power to issue a commission. Under the act of 1795, ch. 88, after a publication against an absent defendant, and after the expiration of the time limited, he might, at any time before a decree, appear in person or by a solicitor, on which the same proceedings were to take place as if he had regularly appeared. This privilege occasioned an unreasonable delay; because it was easy for the absent defendant to appear by his solicitor, and he could not be brought in by an attachment for want

nal case, it appears, that there had been a return against *Scott*, the defendant, attached for not appearing; in consequence of which, on the 30th of March, 1824, the usual order *nisi* was passed, requiring him to appear and answer by the *fourth* day of the next July term, which commenced on the thirteenth, and closed on the twenty-fourth day of the same month. Therefore, at any time after the 17th day of July, 1824, the parties might have obtained the decree, which was signed on the 4th of August, 1825.

That they did not obtain it sooner can only be imputed to their own misunderstanding, negligence, or indulgence; because, the court, on application, would have inspected the proceedings, and have done on the next day, after that day, precisely that which it did, when called upon one year after. The plaintiffs in that case, then, owning to their own negligence or indulgence, stood in no better situation at the July term, 1825, than they did at the July

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of an answer. The act of 1799, appears to have provided a remedy for this inconvenience,—the 9th section, relating to defendants appearing agreeably to an order, limiting a day for such appearance, which is done by the order of publication. An appearance was entered for the defendant at July term, but no answer has been put in. It is urged by the counsel for the defendant, that the bill ought not to be taken *pro confesso*, but that a commission should be issued, under which payments of a part of the mortgage debt might be proved. But it was in the power of the defendant to put in his answer alleging such payments, on which an opportunity would, of course, have been given for the proof of them by commission, or before the auditor. There is nothing to shew, that it is essential to the justice of the case, that a commission should be issued, or even that it should be put before the auditor, the claim being *prima facie* established by the mortgage, and the affidavit of the complainant.* But in order that injustice may not be done to the defendant, inasmuch as the time usually limited for bringing in the money due in such case will go beyond the sitting of December term, the decree is made not to be absolute until the 10th day of that term, during which, on sufficient cause being shewn, such alteration may be made as shall then appear necessary. Decreed, that the property in the proceedings mentioned be sold, &c.

Hepburn *v.* Mollinson.—The defendants, having been summoned, had failed to appear, upon which the plaintiff obtained an interlocutory decree, in the usual form, under the act of 1820, on the 14th of July 1821. After which, on motion by the defendants, Caleb D. Goodwin and others, to appear and to have the interlocutory decree rescinded—

18*th July*, 1821,—Kilty, *Chancellor*,—Ordered, That the decree be rescinded, together with the order for the commission. This order is made under the general power of the court, being the same term; and not on the third section of the act of 1820, ch. 161, which may apply where the term is past. An answer is not therefore required with the appearance, but the suit will stand as if an appearance had been entered in the usual way.

* It appears that the plaintiff's affidavit of the sum due, in the usual form, made before a justice of the peace, was endorsed on the mortgage.

term, 1824; because, their decree by default, according to the established practice, was liable to be corrected or revoked during the term at which it was signed. The July term, 1825, commenced on the 12th of that month, and was not finally closed until the 17th of August following. Consequently, the decree was not final and absolute until that day. After which it could only be opened or affected by an original bill, or a bill of review. The bill to set aside this decree was not filed until the 15th day of November, 1825; and *Scott*, one of the plaintiffs here, was not charged, on the record of the original case, with a default, which might have been fixed upon him by a decree, until the 18th day of July, 1824, making a space of about fifteen months of apparent negligence, which is to be accounted for, justified, or excused. To find which, we must examine the bill and answer in this case.

That the defendant, *Scott*, in the month of July, 1824, and before he could have been finally fixed with a decree by default, had made an answer, which was ready to be put on file; that he had charged his solicitor with the care of it, who had attempted to forward it to the register, to be put on file; are facts proved and not denied. It also appears, that under a firm belief that his answer had reached its destination, and was on file, his solicitor proposed to the solicitor of the plaintiff, to agree upon some day when the cause should be argued by them. The defendant in this case, *Thomas Burch*, in his answer, states, that thereupon his counsel wrote for a copy of *Scott's* answer, and was informed that it had not been filed; which information was shortly afterwards communicated to *Scott's* counsel; which after a considerable interval was again mentioned to him. And it is expressly charged, that *Scott himself* knew the fact before the decree was signed. That *Scott's* solicitor was very negligent is most manifest. But it does not clearly appear, that *Scott*, himself, is chargeable with negligence to a greater extent than about four or five months; for it is not said by *Burch*, in his answer, how long it was before the date of the decree, that *Scott* was informed his answer had not been filed: but it would seem, that the counsel for the plaintiffs in that case, to be assured of the fact whether *Scott's* answer was filed or not, inquired for it, and searched the papers so late as about the first of July, 1825.(*q*)

(*q*) Robson *v.* Cranwell, 1 Dick. 61.

It is admitted by the defendants, that the decree of the 4th of August last is for a greater amount than it ought to have been given for; and that it has awarded to them *three hundred and ninety-two dollars and ninety cents* more than was actually due, and more than they had any right whatever to claim or recover. In this respect, therefore, it confessedly requires revision and correction. It is a decree by default, and not upon the merits. But *Scott* avers upon oath, that he has a good defence against the *whole* claim of the defendants, which he prays to have let in.(*r*) And it is not alleged by his opponents, that they have lost, or been deprived of any means of sustaining their pretensions.(*s*) In short, under all the peculiar circumstances of this case, it appears to be fit and proper, that the decree of the 4th of August last should be revoked; but it must be upon the terms of paying all costs.(*t*)

Whereupon, it is *decreed*, that the decree of this court, passed and signed on the 4th day of August, 1825, in the case wherein *Thomas Burch*, administrator *de bonis non* of *Jesse Burch*, *Fielder Burch*, and others, are plaintiffs, against *William Scott*, defendant, together with all the proceedings in the said suit subsequent to the fourth day of July term, 1824, be and the same are hereby revoked, rescinded, and annulled. And it is further *decreed*, that the said *William Scott* do forthwith pay unto the complainants all the costs which they may have incurred in the prosecution of the said suit subsequent to the 4th day of July term, 1824, to be taxed by the register. And it is further *decreed*, that the answer of the said *Scott*, purporting to have been received and filed on the 7th of December, 1825, in the said case, be and the same is hereby allowed to be filed as his answer in the said suit, subject to all legal exceptions thereto.

From this decree the plaintiffs in the original bill appealed, and the Court of Appeals having reversed this decree without qualification, (1 G. & J. 393,) the plaintiffs again sued out a *fieri facias* upon the decree of the 4th of August, 1825, on which execution, it is understood, that the plaintiffs, as before, endorsed a credit for so much as they admitted had been awarded to them more than was due.

(*r*) Stanard *v.* Rogers, 4 Hen. & Mun. 438; Erwin *v.* Vint, 6 Mun. 267.—(*s*) Wooster *v.* Woodhull, 1 John. C. C. 539.—(*t*) November, 1787, ch. 9, s. 6.

HALL *v.* HALL.

Wherever a testator devises a part of his estate to one who has a claim upon it independently of him; it is a settled principle of equity, that the devisee shall not be allowed to disappoint the express or obvious intention of the testator by taking both; but shall be put to his election to take the one or the other.

The mode of reviving a suit in equity, according to the act of 1820, ch. 161, which had abated by death. But that act being cumulative, the party may revive either in that mode or by bill. The new mode of reviving applies to no case, except that of a devisee, where a proper bill of revivor will not lie; nor does it apply to an abatement by marriage; or to an abatement after a decree.

This bill was filed on the 11th of September, 1816, by *William White Hall*, against *William Hall* and *Edward Hall*, as the executors of the late *Thomas Hall*, and against *George W. Hall* and others, as his children and legatees. The object of the bill was, to recover a legacy given by the deceased to the plaintiff; and the defence made by the answers of the defendants was, that the plaintiff, who claimed as legatee under the will, had taken and held certain lands as heir in tail in opposition to the will; and therefore ought not to be allowed to sustain this suit for the legacy.

After this bill was filed, the plaintiff died, and *Elizabeth Hall*, his administratrix, by her petition prayed to be admitted as plaintiff in his place.

10*th December*, 1823.—Johnson, *Chancellor*.—Ordered, on examining this application and the accompanying exhibits, that the petitioner be, and she is hereby admitted a complainant, and authorized to conduct the suit; in doing which, the rules laid down by my predecessor, in the case of *Labes v. Monker* at July term, 1821, must be pursued.(*a*)

(*a*) Labes *v.* Monker.—This bill was filed on the 8th of June, 1820, by James Labes, against William Monker and John C. S. Monker, to set aside a conveyance of a certain chattel real, made by the defendant William to the defendant John, on the ground, that it had been fraudulently made to defeat a judgment at law obtained by the plaintiff against the defendant William; upon which judgment the plaintiff had issued an execution, and had it returned without its having been delivered to the sheriff; after which he had issued another *fieri facias*, upon which the sheriff had returned *nulla bona*. The plaintiff, by his bill, prayed, that the deed might be declared void; and, that he might be relieved according to the equity and nature of his case.

The defendants were summoned, and both of them appeared, but failed to answer the bill. After which the solicitor of the plaintiff came into court, and suggested his client's death, and moved, that his legal representatives might be made parties.

After which this new plaintiff, *Elizabeth Hall*, having abated her suit by her marriage with *John B. Bayliss*, they filed their petition, stating the fact, and praying to have it revived in the mode allowed by the act of 1820, ch. 161; which petition they submitted without argument.

30*th October*, 1826.—Bland, *Chancellor*.—It is perfectly obvious, that the fourth, fifth, sixth, and seventh sections of the act of 1820, ch. 161, have done nothing more than to authorize a party to pursue the course therein prescribed in place of a bill of revivor. It is declared, that if a party shall die, "it shall not be necessary to file a bill of revivor," but that this new method may be taken for renovating the suit. The act has neither expressly nor impliedly abrogated the mode of reviving a suit by bill of revivor; but has only given this new method of proceeding as an additional mode of attaining that object, which before could only be effected by a

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13*th July*, 1821.—Kilty, *Chancellor*.—A motion was made by counsel for a new party to be entered on the death of the complainant, under the act of 1820, ch. 161; and some observations were made by other counsel, with a view to the future practice.

On considering the act, the following decisions are made as to the present motion, which will, of course, serve in future cases.

1st. The application must be by petition or motion, reduced to writing, suggesting the death, and praying to be made a party.

2d. By this act the court is to be satisfied of the death, and of the applicant's being the legal representative; which cannot be done without some proof. The proof required, will be an exhibition of the letters, or an exemplification thereof, or a certificate of the register, under seal, of their having been issued; or an affidavit of the death and administration.

3d. An order will then be passed, by the court, to admit such applicant as a party in place of the deceased.

4th. A minute of the application, and of the order, is to be entered on the docket by the register.

5th. The notice of the admission required by the act shall be given to the opposite party or parties, if residing, or found within the State, by serving an attested copy of the order, or leaving it at their usual place of abode; on proof of which being filed, the new party may proceed in the suit, and not before.

6th. If the opposite party resides out of the State, a form of publication must be prepared, stating briefly the application, and order of admission, with the following conclusion, viz. "It is thereupon ordered, that the said ——— give notice of his admission as aforesaid, by causing a copy of this order to be published at least once in each of three successive weeks in the ———, to the end, that the opposite party may shew cause, if any he hath, to the contrary, on or before the ——— day of ———."

In deciding on the construction of the 4th section of the act, I have considered, that it is not, in any way, affected by the directions in the 7th section; and also, that it is not to be regulated by the practice of the courts of law, under the act of 1785, the words of which are, that the appearance of the executor, &c., shall be admitted to be entered.

bill of revivor. But it is a new course of proceeding, which can only be used in place of a mere naked bill of revivor, by which the *person* in whom the title is vested, is the sole fact to be ascertained, and nothing more. It can be resorted to in no case, except that of a *devisee*, where a proper bill of revivor will not lie; nor can it be used in any case for the purpose of performing the office of a mere bill of revivor, but where an abatement has happened by *death*;(*b*) for, it is expressly confined to the case of a bill in chancery, where "either or any of the parties shall *die* or shall *have died*." And not being repugnant to, nor having superseded any other mode of proceeding; nor authorized or contemplated the revival of a suit in any case where it was before deemed illegal or unnecessary to have it revived; it follows, that it can apply to no case like the present, where the suit has been abated by the *marriage* of a female plaintiff; nor can it authorize or require a revival on the marriage of a female defendant, which, not operating as an abatement, did not call for a revival;(*c*) nor can it apply to any case, except that of a *devisee*, where, because of the new party's

(*b*) It seems to have been the ancient practice of this court, in such cases of abatement, to enter upon the docket a suggestion of the death of the party; and then, as a matter of course, to add, "Leave given to file a bill of revivor;" in all such cases as might be revived, (*Wilmot v. Taylor*, 1771, *Chan. Pro. lib. W. K. No.* 1, *page* 31—*a similar entry* 1762, *Chan. Pro. lib. D. D. No. J. page* 57.) But this practice was altered.

July term, 1806.—KILTY, *Chancellor*.—Ordered, that where an entry has been made on the docket of "Leave to file a Bill of Revivor," in any case which ought to *abate* by the death of a party, the said entry be stricken out, and the suit entered "abated." And that such suit be not brought forward or continued on the docket until a bill of revivor shall be filed;—and that in future cases the entries be made according to this order. The Chancellor considering, that the provision in the act of 1785, ch. 80, on this subject, extends only to suits at law

(*c*) The act of 1831, ch. 311, s. 14, declares, "that no suit in equity shall abate by the marriage *of any of the parties*," &c., which, it is presumed, must be construed to mean any of the parties, *plaintiffs*; and that, although the suit may have been actually abated by the marriage of a female plaintiff, yet that it may, as therein prescribed, be revived.

MANNING *v.* MILLS, 1722.—Bill abated, with costs, by reason of the complainant's intermarriage with one Combs.—*Chancery Records, lib. P. L.* 785.

TAYLOR *v.* GORDON, 1728.—Service of subpœna *being proved*, Ordered, attachment to issue unless appearance July court next. Petition for *dedimus* to take answer. *Dedimus* issued. Ruled attachment to issue for answer, and contempt to be paid and further process unless answer within ten days of this court. Attachment. The defendant being lately married to Nicholas Ridgely, ordered, that he be made party, and that attachment of contempt issue against him and defendant, Ann, his wife. After which, Nicholas came in accordingly with his wife, and answered.—*Chancery Records, lib. P. L.* 1031—1033.

not claiming by operation of law only, a mere bill of revivor will not lie; nor can it be resorted to by a defendant as a means of reviving the suit in any case, except after a decree when he can derive a benefit from the further proceedings, and the plaintiff neglects to revive: for no man can be compelled to revive and prosecute a suit, who can have no possible advantage from it.(*d*) And as it cannot be presumed, that the mode of proceeding prescribed by this law was intended to stand as an addition to any pre-existing and similar mode of proceeding, which was, in its nature, more cheap, simple, and expeditious; it therefore cannot be considered as having been intended to apply to any case of an abatement, after a decree, where the suit may and ought to be revived by a subpœna *scire facias*.(*e*)

It must also be recollected, that the form of proceeding, under this act of assembly, as laid down in the case of *Labes* v. *Monker*, refers only to a case where the representative of a deceased party *applies* to be admitted in his place; for, the act evidently contemplates a different mode of proceeding, where the *surviving* party proposes to revive the suit *against* the representatives of a deceased party. But as it is sufficiently obvious, that a suit cannot be revived in the mode prescribed by this act, which has been abated, as in this instance, by the marriage of *a female plaintiff*,

It is therefore ordered, that this petition be dismissed, with costs, to be taxed by the register.

Whereupon *Bayliss* and wife filed a bill of revivor, stating the fact of their marriage, which being admitted, and an answer to the bill of revivor, for that purpose, having been dispensed with, by consent, and the case considered as having been thus revived, it was brought before the court accordingly upon its merits.

1*st January*, 1827.—Bland, *Chancellor*.—This case standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

This suit has been instituted to recover a legacy given by the late *Thomas Hall* to his son *William W. Hall*, the late plaintiff. This *Thomas Hall*, in the lifetime of his wife, had, besides the late complainant, *William W. Hall*, seven other children; and was then in possession of personal property to a considerable amount in

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(*d*) 1 Mont. Dig. 303; 2 Mad. Chan. 526; Beams' Plea. 287.—(*e*) 1 Harr. Pra. Chan. 669; 2 Fow. Ex. Pra. 419; Mitf. Pl. 69.

value; and was seized of two tracts of land, as tenant in tail male; and of other parcels of land, in fee simple. Under which circumstances he made his will, wherein he says: "I request my executors, hereafter named, to dispose of all my estate, both real and personal, except some legacies, hereafter mentioned, to the best advantage, and after having first paid all my just debts, out of the sales of my personal property, to pay unto my wife *Isabella*, one third part of the remaining balance, which the law gives her." And he then goes on to dispose of his estate among his children; giving to his son *William W. Hall*, the late complainant, one thousand pounds.

Soon after making this will, *Thomas Hall* died. Whereupon the late plaintiff, *William W. Hall*, as heir in tail, entered upon, held and disposed of the entailed estate to his own use. In consequence of which, *Edward Hall* and *William Hall*, the executors of *Thomas Hall*, deceased, refused to pay *William W. Hall* the legacy given him by his late father; alleging, that he could not be thus permitted to disappoint the will of their testator, by taking both the estate tail and the legacy; since the estate tail constituted a material part of the fund, out of which the legacy was given. And, to shew that such was the intention of their testator, they exhibited, as a part of their answer, a paper purporting to be a schedule, made by him, of all his estate, and upon which, as they allege, he predicated his will. But this schedule has neither been admitted nor established by proof; and therefore cannot be permitted to have any bearing whatever upon this case. From the pleadings, proofs, and agreements of the parties, it appears, that the whole controversy has been reduced to a single question; that is, whether *William W. Hall* can be put to his election to take either the entailed estate or the legacy; or be allowed to have both?

Wherever a testator devises a part of his estate to one, who has a claim upon it independently of him; it is a settled principle of equity, that the devisee shall not be allowed to disappoint the express, or obvious intention of the testator by taking both; to insist upon his claim, to its full extent, and also to take all the benefit bestowed upon him by the will. The devise, in such cases, is considered, in equity, as having been made upon an implied condition, that the claim shall be waived; and therefore the devisee will be bound to make his election to abide by the will, and take under it entirely, relinquishing his claim; or to abandon the will altogether.

But then the intention of the testator, that such devisee should be put to an election, must be either distinctly expressed, or very strongly manifested by facts and circumstances; for, no one can be stripped of his rights by guessing or conjecture. It must distinctly appear, that the claim is irreconcilable and incompatible with the devise; or that to sustain the claim, would throw the testator's estate into a channel entirely different from that in which he had placed it by his will. To prevent such a perversion, or disappointment of the express, or clearly manifested intention of the testator, a court of equity will, by a strong operation of its powers, put the devisee to an election.(*f*) But there is no instance of a devisee being made to elect upon slight presumptions or inferences; or where the will might have its full effect without impairing the obligation of the claim; or where the testator has property, which is absolutely his own, answering fully to the description of that spoken of in his will, and by which all its expressions may be satisfied.(*g*)

In this case, it appears that the testator had a considerable real estate, in fee simple, by which his expressions, "all my estate, real and personal," may be amply gratified without embracing the entailed estate. There is nothing upon the face of the will itself, nor any thing in the circumstances under which it was made, which necessarily or very clearly shews an intention to comprehend the entailed as well as the fee simple estate. Although the testator might, during his lifetime, have aliened the lands which he held as tenant in tail, by a mere deed of bargain and sale, legally executed and recorded; and thus have barred the right of the heir in tail; yet, it is very certain, that he could not *devise* those lands by his last will and testament.(*h*) Upon the whole, then, it is my opinion, that the plaintiffs are entitled to recover; and the amount in such case having been agreed upon; it is thereupon,

Decreed, that *Edward Hall*, the surviving executor of the late *Thomas Hall*, forthwith pay unto the claimants, *John B. Bayliss* and *Elizabeth* his wife, as administrators of *William W. Hall* deceased, the sum of $2666 66, or that the said defendant bring the same into this court to be paid to the said complainants; the

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(*f*) Noys *v.* Mordaunt, 2 Vern. 581; 2 Mad. Chan. 51; Blake *v.* Bunbury, 4 Bro. C. C. 21; Sheddon *v.* Goodrich, 8 Ves. 482; Dillon *v.* Parker, 1 Swan, 359. (*g*) Pow. Devi. 465.—(*h*) Paca *v.* Forwood, 2 H. & McH. 175; Laidler *v.* Young's Lessee, 2 H. & J. 69.

said sum of lawful money being the value, and in satisfaction of the legacy given by the late *Thomas Hall* to the late *William W. Hall*, as in the proceedings mentioned. *Decreed*, that the defendant and complainants each pay their own costs. *Decreed*, that the bill of complaint be dismissed as to all the other defendants, with costs.

From this decree the defendant appealed, and on the 22d July, 1829, it was affirmed by the Court of Appeals.

COALE *v.* CHASE.

The allegations in the body of an answer, or plea, should be positive, otherwise the issue would be joined on a mere statement of the *belief* of the parties, not upon their allegations of *fact*. Yet to obtain a dissolution of an injunction, it is sufficient that an executor or administrator, in stating facts, which from the nature of the case, could only have been personally known to his testator, or intestate, should say, that they are "as he is informed and verily believes," so and so. It is sufficient if the affidavit be so absolute and positive, when taken in connexion with the body of the answer, as to subject the party to a prosecution for perjury; if the matters stated should be false.

This bill was filed in Harford County Court on the 13th of October, 1826, by *Skipwith H. Coale* and *Eliza Matilda Coale*, against *Hannah Kitty Chase*, in which it is alleged, that the plaintiff, *Skipwith*, had given his bond to the defendant *Hannah* for the payment of the sum of five hundred dollars, upon certain trusts and conditions, in favour of her daughter the plaintiff, *Eliza;* but that the defendant *Hannah*, regardless of this their special agreement, had brought suit against the plaintiff, *Skipwith*, upon the bond, and obtained judgment. Whereupon the plaintiffs prayed an injunction to stay execution, and for relief according to the nature of their case. An injunction was granted as prayed. The defendant filed her answer, and obtained an order under the act of 1824, ch. 196, to remove the case to this court, and the proceedings were accordingly filed here on the 25th of November, 1826; after which the defendant gave notice of her motion to dissolve the injunction, and the case was brought before the court.

3*d January*, 1827.—Bland, *Chancellor*.—This case standing ready for hearing on the motion to dissolve the injunction, the solicitors of the parties were heard, and the proceedings read and considered.

The allegations in the body of an answer or plea should be positive, otherwise the issue would be joined on a mere statement of the *belief* of the parties, not upon their allegations of *fact*. But it is the law arising out of the *facts*, not merely from the *belief* of the parties, which is to be determined.(*a*) Yet where an injunction has been granted against an executor or administrator, it is sufficient for him, in order to obtain a dissolution of it, to state, as to any facts, in regard to which the bill calls for an answer, and which must, from the nature of things, have rested in the knowledge of his testator or intestate, that they are as he "is informed and verily believes," so and so.(*b*) But the answer of this defendant, in the body of it, has spoken so distinctly and positively as to the facts; and thus, so entirely sworn away the equity of the bill, that I could have no hesitation in dissolving the injunction, at once, were it not for an objection to the *form* of the affidavit thereunto annexed by which it has been verified. In that affidavit the defendant swears, "that the several matters and facts set forth and stated in the within and aforegoing answer are just and true as they are therein stated, according to the best of her knowledge, belief, and recollection." This the plaintiffs allege is too vague, indefinite, and general.

Regularly the affidavit, in all such cases, should assert, "that the facts within the defendant's own knowledge are true, and that those facts not within his own knowledge he believes to be true." But here, there has been, as far back as has fallen within my observation, a very great neglect of all regularity in the forms of such affidavits; and therefore, I should not feel myself authorized, at once, to depart from even so improper a practice as to require, in such affidavits, more than a substantial sufficiency. As to which I know of no better test than, that they must be so absolute and positive, when taken in connexion with the body of the answer, as to subject the party to a prosecution for perjury, if the matters stated in the answer should be false. It is now well settled, that if a man swears he *believes* that to be true which he knows to be false, he swears as absolutely, and is as criminal, and may be prosecuted and punished for perjury in like manner, as if he had made a positive assertion.(*c*) The affidavit to this answer is not as correctly expressed as it ought to have been; but when taken in con-

(*a*) Beams' Pl. Eq. 26.—(*b*) Carnan *v.* Vansant, adm'r. MS. 1807.—(*c*) 2 Chitt. Crim. Law, 305; 1 Hawk. P. C. c. 69, s. 7; Miller's case, 3 Wilson, 427.

nexion with the whole answer, I deem it substantially sufficient; because if any of the allegations of the answer are false, the defendant will be as clearly liable to a prosecution for perjury as if the affidavit had been couched in the most positive terms.(*d*)

Whereupon it is ordered, that the injunction heretofore granted in this case, be and the same is hereby dissolved.

GIBSON'S CASE.

The Court of Chancery has the power in all cases, where it may be necessary, to appoint and employ a person as its trustee or agent to make sale of property for the purpose of executing a decree or order. It may appoint a woman or any competent person on the recommendation of the parties interested; or if they are silent, the plaintiff's solicitor is usually appointed. But the court will not appoint any one of its own officers, or any other officer to be trustee, the discharge of whose official duties may be incompatible with a proper attention to his duties as trustee; nor will the court employ, as its trustee, an infant, *feme covert*, or non resident. For negligence or improper conduct a trustee may be removed. In general, the trustee is to be regulated by the directions of the order or decree; but in making a sale, he may deviate from the mode prescribed by the decree, after the property has been put into the market, by advertising it for sale as directed. Commissions, or poundage fees to trustees, are allowed by law and regulated by rule of court. The commission is given as a compensation for the performance of all the duties specified in the decree, and the subsequent orders in relation to the sale, and its proceeds. The trustee may employ an auctioneer. The allowance of commissions to a trustee may be refused, diminished, or enlarged, according to the nature and circumstances of the case.

This matter arose on a bill filed, on the 7th of November, 1821, by the Farmers Bank of Maryland, against *John J. Gibson* and others, the representatives and trustees of the late *John Gibson*, for the sale of a real estate, which he had mortgaged to the bank to secure the payment of $5325 20, with interest; upon which a decree was passed, on the 12th of February, 1822, appointing *Addison Ridout* to make the sale; who reported, that he had made a sale of it, for one-third cash, and the residue in three annual payments, which sale was, on the 3d of November, 1825, finally ratified, allowing the trustee for commission and all expenses, $309 50. The auditor thereupon stated an account, distributing the proceeds of sale, in which the amount allowed to the trustee was appropriated to him, which account as reported by the auditor was ratified on the fifth day of the same month. Some time after

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(*d*) 2 Chitt. Crim. Law, 392; Beams' Pl. Eq. 27; Drew *v.* Drew, 2 Ves. & B. 159.

which the trustee, *Ridout*, died, before he had collected the whole amount of the purchase money; and, on the 14th of December, 1826, *Louis Gassaway* was appointed as his successor to complete the trust; and he now asks for an allowance of commissions on the sum of $4779 70, the balance of the purchase money collected by him.

15*th February*, 1827.—Bland, *Chancellor*.—It has been the practice of this court, for a long time, in a great variety of cases; but, particularly in creditors' suits, to have its decrees and orders carried into effect by a kind of occasional executive agents, called trustees; who perform offices, in many respects, entirely analogous to those of the regular executive officers of the courts of common law; and similar to those which, in the English Court of Chancery, are performed by the regularly constituted officers of that court, called masters in chancery. The trustees of this court hold a place under it, and discharge their duties in a manner entirely unknown to the English chancery system. The principles by which they have been governed have grown out of the nature of the cases in which they have been employed; and, although often modified, as propriety and convenience seemed to suggest, they cannot yet be regarded as being as well settled, and as generally understood as the nature of the subject requires.

Trustees appointed and employed by this court have always been considered as its ministerial officers; and, in whatever way they may have originated, the power to employ such agents having been recognised and affirmed by several legislative enactments, it may be now considered as finally and firmly established.(*a*)

(*a*) 1785, ch. 72, s. 7; April 1787, ch. 30, s. 5.

Pue *v.* Dorsey.—This bill was filed on the 9th of June 1784, by Michael Pue, William Goodwin and Milcah his wife, and Eleanor Dorsey, surviving executors of Caleb Dorsey, against Edward Dorsey, son of Samuel. The bill states, that the plaintiffs' testator being seized and possessed of a large real and personal estate in iron works carried on in copartnership with a certain Alexander Lawson, in May 1772, purchased the share held by Lawson, for which he agreed to pay the sum of three thousand pounds sterling; soon after which the testator made a codicil to his will, wherein, among other things, is contained the following devise:

"I give to my two sons, Samuel Dorsey, and Edward Dorsey, and their heirs for ever, to be equally divided between them, to hold as tenants in common all and singular the furnaces and iron works, tracts, pieces and parcels of land, negroes, white servants, horses, cattle, wagons, carts, and stock, of what nature and kind soever, and all and singular the parts, shares, and proportions of the furnace and iron works, tracts, pieces and parcels of land, negroes, white servants, horses, cattle, wagons, carts, and stock of what kind or nature soever, which I have lately purchased from, or contracted to purchase from, and of a certain Alexander Lawson, of Baltimore

There are many civil offices which, according to the common law, a woman is incompetent to fill, such as those of judges, jus-

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county, gentleman. And I do further direct, that such part of the consideration money as shall be due and owing to the said Alexander Lawson, for the aforesaid premises at the time of my decease, shall be paid equally, share and share alike, by my said two sons, their heirs, executors, or administrators."

The bill further states, that after the death of the testator these devisees took possession of the estate so devised to them; but having failed to pay the purchase money, Lawson brought suit against the plaintiffs, as executors, and obtained judgment against them, and had issued execution thereon; that Samuel Dorsey, one of the devisees, died some time in the year 1777, intestate, greatly involved in debt, without having paid any part of the debt due to Lawson, and leaving the defendant, his heir at law, then a minor, about two years of age; that letters of administration on the estate of Samuel had been granted to his widow, who had paid debts due by him, to an amount greater than his whole personal estate; that the portion of the debt due to Lawson for which the devisee, Edward Dorsey, was liable, had been in part paid, and that there remained due of that debt from the estate of the intestate Samuel, the sum of one thousand five hundred pounds sterling money with interest; for the payment of which his real estate, which had descended to the defendant, was liable. Whereupon it was prayed, that so much of the real estate, which had descended, might be sold as would be sufficient to satisfy the debt then due from the estate of the intestate Samuel.

The exhibits filed with this bill were, the codicil to the will of the testator, Caleb Dorsey; a short copy of the judgment obtained by Lawson against these plaintiffs; and a certificate from the register of wills, that the personal estate of the intestate, Samuel Dorsey, had been overpaid to the amount of £248 14*s.* 7*d.* The defendant having been returned summoned, and appearing to be an infant, Edward Dorsey, son of Caleb, was appointed his guardian to appear, answer, and defend this suit on his behalf; who accepted of the guardianship;* and put in an answer in his name in which he admits the truth of the allegations of the bill, and states, that it would be greatly for his benefit to have a part of his estate sold for the payment of the debt for which it was so liable, (*Pow. Mort.* 916, 1 *Eq. Ca. Abr.* 287.) In additon to this answer the guardian for himself says, "I, Edward Dorsey, son of Caleb, guardian for Edward Dorsey, son of Samuel, the defendant in this case, do hereby *consent*, that the lands mentioned in the aforesaid answer or such part thereof should be sold under the decree of the Court of Chancery, as may be necessary and sufficient to pay the debts due, which is contained in the answer aforesaid," (1773, ch. 7, s. 2.) Upon all which the case was submitted.

4th November, 1784.—Rogers, *Chancellor*.—Decreed, with the *assent* of the said Edward Dorsey, son of Caleb, as guardian of the said Edward Dorsey, son of Samuel, that he the said Edward Dorsey, son of Samuel, by his guardian aforesaid, do set up and expose to sale at public vendue, the several parcels of land in the proceedings mentioned, or such part thereof as may be sufficient to satisfy the complainants, &c. after giving six weeks' notice thereof in the Annapolis and Baltimore newspapers, of the time and place of such sale, and the same when sold, &c. the said Edward Dorsey, son of Samuel, do and shall effectually convey and assure to the purchaser or purchasers thereof, their heirs and assigns, in fee, upon payment of the purchase money to the said Edward Dorsey, son of Caleb, as guardian aforesaid; that the guardian aforesaid shall, &c. satisfy the complainants, &c.; that the guardian afore-

* In most of the proceedings about this time, it is stated that the person appointed "accepted of the guardianship."

tices, &c.;(*b*) but from the general language of our constitution, for there is no express provision upon the subject, it appears, that women are virtually excluded from all the various offices of our government,—legislative, judicial, and executive. From which it would seem to follow, that females could not constitutionally be employed even as the mere ministerial agents of any one of the three departments; or be commissioned to perform any executive duty required by any one of the courts of justice. In cases of lunacy, if the lunatic be a *female*, it is generally deemed most proper to appoint a female committee to take charge of her person. And so in other cases of that class, it has been sometimes held, that the comfort of the unfortunate person would be best promoted by having his person placed under the care of a female committee, as by appointing the wife to be the committee of her husband, &c.(*c*) The Chancellor of Maryland has always been regulated by similar principles and feelings; and therefore with a view to the peace and comfort of the lunatic, his daughter has been appointed trustee of his person with others who were constituted trustees of his estate.(*d*) In a creditors' suit, where the estate of the deceased was likely to be exhausted by the payment of his debts, the widow, on asking to be appointed trustee, with a view to save the commissions for

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said do and shall, as soon as the several parcels of land, &c. are sold, make and lodge in this court, under his hand and with his affidavit of the truth thereof thereto annexed, a just and accurate certificate or memorandum of the said sales, to whom made, and at what price; and also as soon as may be, after the receipt of the purchase money thereof, render to this court a full, just and true account, with his affidavit annexed, of his disbursements thereof, to whom made, and at what time; that the guardian aforesaid do and shall, before any sale, &c. execute and file in this court his bond to the State of Maryland, with good and sufficient surety, faithfully to fulfil and perform the trust in him reposed by the said decree, &c. and that the said guardian do and shall, before the payment of the said sum of money to the complainants, obtain from them a bond to the State of Maryland with good surety, &c. to indemnify, save harmless, and exonerate the said Edward Dorsey, son of Samuel, his heirs, &c. from all charges, &c. on account of the judgments aforesaid obtained by the said Alexander Lawson, and from all claims for which he may be made chargeable by the said codicil to the last will of his grandfather, or by any other means whatsoever.

It appears that the trustee gave bond, and returned an account of his disbursements of the proceeds of sale, with which the record closes.—*Chan. Pro. No.* 2, *page* 136.

Bond *v.* Bond.—On a bill filed on the 1st of October, 1783, a decree was passed 2d January, 1786, for a sale of real estate, which sale was directed to be made by a trustee in a manner precisely similar to that directed by the decree in the aforegoing case.—*Chan. Pro. No.* 2, *page*, 612.

(*b*) The King *v.* Stubbs, 2 T. R. 395; Land H. Ass. 164, note.—(*c*) *Ex parte* Le Heup, 18 Ves. 226; *Ex parte* Ludlow, 2 P. Will. 635.—(*d*) H. Clagget's case, MS. 7th December, 1826.

the support of herself and child, was, no objection being made, appointed trustee accordingly.(*e*) And so in other cases where the appointment of a female appeared to be well calculated to promote the interests of all concerned, she has been employed as trustee to carry the decree into effect.(*f*) Hence it would seem, that although it does not often happen, that females are appointed as the executive trustees of this court, yet they cannot be regarded as incompetent to act as such in any case whatever.

(*e*) Dowig *v.* Marvel, MS., 16th October, 1789.

(*f*) Ex parte Margaret Black.—The petition filed 23d February, 1804, sets forth, that the late George Black, by his last will, declared in these words: "I also direct and devise the farm that I bought of William Keating, together with what land I bought of Simon Weeks, lying on the south side of the road leading from Black's Cross Roads to the brick meetinghouse, to be sold, and the money arising therefrom to be applied to the payment of my debts; residue and remainder of my estate, both real and personal, I give and bequeath unto my son James Black, who I do hereby nominate and appoint executor of this my last will and testament, and I do also appoint him guardian to all my children which may not be of age at my decease;"—that James Black qualified as executor and overpaid the personal estate £1122 15*s.* 2*d.*; that under an impression that he was, as executor, authorized to sell the land, so directed to be sold, he had accordingly sold it to James Welch; and had received a part of the purchase money. After which, James Black, by his last will had appointed the petitioner his executor, and died; that there was still a considerable balance due to James Black. Prayer, that the Chancellor would ratify what had been done, on the ground, that he might sanction that when done which he might have directed to be done; or that he would authorize a private sale to enable James Welch to become the purchaser so as to affirm and reassure his title, and to have the purchase money applied in discharge of the claim of the late James Black, &c. Upon which the following decree was passed.

4th February, 1804.—Hanson, *Chancellor*.—The said petition with the last will and testament of George Black were, by the Chancellor, read and considered; and provided the facts stated in the said petition be true;—*decreed*, that the real estate of George Black in the petition and will mentioned, as devised to be sold, be sold according to the directions and provisions of the said will; and that Margaret Black, &c. be trustee, &c. &c.; she shall proceed to sell either at public or private sale, and on such terms and conditions as she may deem most advantageous to the estate, &c. &c. "Provided, and it is the true intent and meaning of this decree, that if it shall appear to the trustee, that the sale made by her deceased husband, James Black, to James Welch, was a fair and beneficial sale for the estate, that the trustee shall then confirm and agree to the same, and make report to the Chancellor; and on the Chancellor's ratification and confirmation, and on the payment of the purchase money, the trustee shall by a good and sufficient deed convey to the said James Welch and his heirs, the land he purchased, which deed shall have the same effect as herein before mentioned." (*Ex parte Mary J. Bayard, by her next friend, order* 22*d March*, 1802; *and* 1818, *ch.* 193, *s.* 9.)

The trustee, Margaret Black, reported her approbation of the sale made to Welch, which on the 28th November, 1805, by an order, was to be ratified *nisi*, &c., publication to be made in the Easton newspaper, "or set up and continued three weeks at the door of the courthouse of Kent county before the end of December next;" which order was afterwards made absolute.

But where it appears that the duties of trustee are altogether, or in most respects incompatible with the duties of the office which the proposed person holds, such as that of the register of this court, a clerk, or a judge of a county court, &c., such person cannot be employed as a trustee by this court.(*g*) In general, where the sale or disposition of any property is to be confided to a trustee, he must be required to give security for the faithful performance of his trust; and, consequently, as no one can be so appointed who is incompetent to contract, an *infant* or a *feme covert* cannot be a trustee in any such case. It is necessary, in all cases, that the trustee of the court should be a *citizen*, *resident* within its jurisdiction; not only, that he may be the better able to discharge his duties; but, that he may be continually within its reach and control; therefore, no one who is not a resident, or who is engaged in any pursuit, or who holds any office which may require, or subject him to go, or be ordered out of the State during any long intervals of time,—such as masters of merchant vessels, or officers in the army or navy,—can be appointed trustees. And as a trustee can only be appointed during the pleasure of the court, if he remove out of the State, neglect his duty, or is guilty of any injurious or improper conduct, he may, on application of any one concerned, be displaced, and another trustee appointed in his stead.(*h*)

In making the selection of a person to be employed as a trustee, the court exercises a sound discretion upon a view of the whole case; and as the Chancellor may allow himself to be actuated by feelings of benevolence upon such occasions, where he can do so without injustice to any one, he has therefore, as before observed, appointed the widow as trustee, that she might obtain the commissions for the benefit of herself and child. The recommendations of the parties are always attended to, and allowed to have their due weight as to numbers, amount of interest, and reasons assigned; where the parties are silent, it has been usual to appoint the solicitor of the plaintiff as trustee; but a plurality of trustees is never appointed except on special application by petition, motion, or suggestion.(*i*)

(*g*) Bac. Abr. tit. Offices & Officers, (K).—(*h*) *Ex parte* Ord, Jac. Rep. 94; Logan *v.* Fairlee, Jac. Rep. 193; Berry's case, MS. 14th May, 1803; Chew *v.* Birkhead, MS. 30th June, 1798; Kilty *v.* Quynn, MS. 5th January, 1813, and 1st August 1815.—(*i*) Edwards *v.* Buchanan, MS. 27th May, 1800; Kilty *v.* Quynn, MS. 5th February, 1805.

The kind of duties required of a trustee, and the manner in which they are to be performed, are most usually particularly prescribed by law, or specified in the decree or order to be executed. But here a trustee is indulged with a greater latitude of discretion in making sales of property than is allowed to a master in chancery in England.(*j*) In all cases where the trustee is directed to put the property into the market, by advertising and offering it for sale, he must do so; but, after that has been done, if it cannot be sold, at public auction, upon the terms specified, he may accept of a bid upon different terms, or he may dispose of it at private sale, or upon other terms than those mentioned in the decree; because as he is, in all cases, required to make a report in writing of only such a sale as he can, on oath, state to have been, in all respects, fairly made, which cannot be ratified, without consent, until public notice has been given to shew cause, if any there be, why it should not be confirmed; there can be no danger or inconvenience in allowing him to deviate from the prescribed manner and terms of sale, after the property has, by advertisement and an actual public offer to sell at the time and place appointed, been completely put into the market. A trustee cannot, however, be allowed, of himself, to do any act which, in similar cases, is usually required to be done by such an agent; but which has not been particularly specified in the order or decree, under which he holds his appointment; as where, in a creditor's suit, the court had omitted, in its decree, to direct the trustee to give notice to creditors to file the vouchers of their claims by a specified day, the trustee was not permitted, of himself, to give any such notice.(*k*)

According to the common law, no public officer was permitted to take any fees for the performance of his duty, except such as were expressly allowed by law, as a compensation for his trouble. Yet it appears, that judicial, as well as ministerial officers were allowed to make title to certain fees and perquisites by usage, and custom; and although it would seem, that no petty pecuniary charge should be permitted to intercept an extension of mercy, intended to save the life of a fellow creature, yet it is said, that in England, if a person pleads his pardon, the judges may insist on the usual fee of gloves to themselves and officers before they allow it.(*l*) Before

(*j*) Annesley *v.* Ashhurst, 3 P. Will. 282.—(*k*) Isaac Williams' Estate, MS., 3d December, 1823.—(*l*) Co. Litt. 368; 2 Inst. 209; 3 Jac. L. Dict. 24.

the revolution, the judicial and ministerial officers of the government, here as well as in England, were allowed to take fees ;(*m*) but the Constitution has declared, that no chancellor or judge shall receive fees or perquisites of any kind.(*n*)

The fees of all regularly constituted ministerial officers have been regulated by law ;(*o*) and it is declared, "that the Chancellor shall have full power and authority to allow any guardians, trustees, agents, or factors, who shall make disposition or sale of either real, personal, or mixed property, for the purpose of paying the debts of deceased persons or others, under and in virtue of any order or decree of the Chancery Court, a commission from one *per cent.* to seven and a half *per cent.* for their trouble in selling and disposing thereof, and paying the same away in pursuance of such order or decree as the Chancellor shall, on consideration of all circumstances, think just and right."(*p*) By a rule of this court of the 14th of June, 1797, it was declared, that "the standing order of this court relative to the commission of trustees for the sale of real estates having been lost or mislaid, ordered, that in future the following allowances shall be made :—On the first hundred pounds seven *per cent.*, on the second hundred pounds six *per cent.*," and so on, as in the existing rule, to the tenth hundred pounds, and then it is further declared, that "all above £1000 at the rate of two *per cent.* This allowance is to be clear of all necessary, except personal expenses; and is intended for cases where the sale is for ready money or to satisfy one debt only. Where the sale is on credit, or to satisfy more than one creditor, the Chancellor will make a further allowance from a half to one and a half *per cent.*, on the whole amount of sales, according to the circumstances of the case."

From which it may be inferred, that the lost standing order, of which this is a renewal, had been made in conformity to the act of assembly, and soon after it was passed. It appears, however, that although fees, which have been settled by the ancient course of the court, cannot be altered, but by an act of the legislature,(*q*) yet this standing order, for regulating the commissions of trustees, has been frequently departed from ; for, there are many cases in which a commission, not thus graduated, and varying from two and a

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(*m*) 1763, ch. 18, s. 87, &c.—(*n*) Dec. Rig. art. 30.—(*o*) November 1779, ch. 25; 1826, ch. 247.—(*p*) April 1787, ch. 30, s. 5; 1816, ch. 154, s. 2 & 4.—(*q*) *Ex parte* Jephson, Prec. Chan. 551.

half to seven and a half *per cent.* on the whole amount has been allowed.(*r*)

But this act of assembly authorizing the allowance of a commission, as well as this rule by which that commission was graduated into the form of poundage fees, allowed to a sheriff for the sale of property taken in execution, it is evident, were both confined to sales made "for the purpose of paying the debts of deceased persons, or others;" and consequently, although they applied as well to sales of mortgaged property as to sales in creditors' suits, and the like; yet they did not extend to any case of a sale made of real, or personal property, because of its indivisible nature, for the purpose of dividing the proceeds among those by whom it was held jointly or in common; nor do they apply to the case of a sale made, pending a suit, of the property in litigation, because of its perishable nature, for the purpose of preserving its value to him to whom it may be determined to belong, by the final decree. Yet in these, as well as in all other cases, whether embraced by the act of assembly or not, the trustee has been allowed a commission, or compensated for his trouble in one form or other. But by the existing standing order passed at March term, 1817, it is declared, that "on sales under decrees or orders of the court, the following allowances to be made to trustees, &c. On the first three hundred dollars, seven *per cent.;* on the second, six *per cent.;* on the third, five; on the fourth, four; on the fifth, three and a half; on the sixth, three and a half; on the seventh and eighth, three; and on the ninth and tenth hundred dollars, two and a half *per cent.* And three *per cent.* on all above three thousand dollars; besides an allowance for expenses not personal. The above allowance subject to be increased in cases of postponement, at the request of the defendants, or of extraordinary difficulty or trouble from other circumstances; and to be lessened in case of negligence, &c. at the discretion of the Chancellor." This rule is expressed in the most comprehensive terms, and embraces all sales made by a trustee, under the authority of the court, for any purpose whatever.

The commission allowed to a trustee is given to him as a compensation for his trouble and risk in making the sale, bringing the

(*r*) Dulany *v.* Brice, MS., 27th December, 1794; Dowig *v.* Marvel, MS., 16th October, 1789; Anderson *v.* Anderson, MS., 17th April, 1789; Dorsey *v.* Cooke, MS., 16th October, 1789; Taylor *v.* Casanave, MS., 11th March, 1819; Mildred *v.* Neil, MS., 26th February, 1788.

money into court, and paying it away in the manner directed; or, in other words, for the performance of all the duties specified in the decree, and the subsequent orders in relation to the sale and its proceeds. It is sufficiently evident, from the language of the rules, graduating the rate of the commission into the form of poundage fees, that the commission allowed to a trustee has never been considered, in any respect, as a commission in the mercantile sense of that term. A trustee of this court is a person of legal constitution, with legal duties; and though some of his duties may have a mercantile mixture in them, he does not transact them as a merchant. He acts altogether as a legal officer, and must be paid, as such, in proportion to his diligence, skill, trouble and risk; not exactly according to the value of the subject in litigation.(*s*) And therefore the term *commission*, in the mercantile sense, cannot be applied to the compensation of a trustee, or any other officer of this court. But it has been found, in many cases, to be highly expedient, if not absolutely necessary, to have the property sold by an auctioneer; and it is obviously for the benefit of those concerned, that all sales should be so conducted,(*u*) although no fee is allowed to a sheriff for so making a sale.(*v*) Therefore it has been deemed proper to permit the trustee to employ an auctioneer, to whom may be allowed a fee, not exceeding five dollars, for each separate and unconnected sale.

Considering the nature of the office of a trustee, it follows, that as on the one hand, his compensation may, because of the discharge of his duties being attended with a very unusual degree of labour and risk, be increased; so, on the other hand, his compensation, because of his duties having been improperly or but partially performed, may be altogether withheld, or proportionably diminished. As where it appeared, that the trustee had been under the necessity of making several journeys or voyages, or had already, and should thereafter incur much extraordinary trouble for the purpose of executing the decree, he was allowed a compensation, in addition to the commission specified by the rule.(*w*) On the other hand, where the

(*s*) The Rendsberg, 6 Rob. Adm. Rep. 164; Wood *v.* Freeman, 2 Atk. 542.—(*u*) The Rendsberg, 6 Rob. Adm. Rep. 168.—(*v*) The King *v.* Crackenthorp, 2 Anstr. 412.

(*w*) The Rendsberg, 6 Rob. Adm. Rep. 163; Hindman *v.* Clayton, MS., 8th March, 1805.

Millar *v.* Baker.—This was a creditors' bill, filed on the 12th of February, 1796, to have the real estate of the late Christian Baker, lying in Frederick county, sold to pay his debts, &c. On the 2d of June, 1796, it was decreed, in the usual

trustee, after having given bond, had forborne, at the request of the defendant, to make the sale, he was allowed half commis-

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form, that the property in the proceedings mentioned be sold; which was sold accordingly. After which the following remarks and orders were made:

8th December, 1796.—HANSON, *Chancellor*.—It is stated, that Jacob Scheisler contracted for the sale of a parcel of ground in Frederick county, to Christian Baker, for £50 on credit; that the contract was, that a deed be given on Baker's executing a bond for the money; that Baker took possession and died without having executed a bond, or taken a conveyance; but that, before his death Baker paid one year's interest on the said £50, to Scheisler; that after Baker's death his creditors obtained a decree for selling his real estate; that under the decree, the said lot, which had been improved by Baker, was sold with other property, in which Baker had a legal estate in fee; that, since Baker's death, Scheisler has neither received the consideration money, nor conveyed; but that he declares his willingness to convey, on receiving the money, although he will not file his claim in the Chancery Court.

On this statement, it appears unreasonable, that Scheisler will not exhibit his claim to the Chancellor; and that such exhibition would be convenient to all parties, by saving the trouble and expense of a chancery suit, in which Scheisler might probably be compelled to convey on receiving his money. The Chancellor cannot direct money to be paid to Scheisler, unless he exhibits his claim, or is called to answer a bill or petition for conveyance. Upon the whole, the Chancellor thinks proper to declare, that, provided the above statement of facts be full and correct in every particular, it will be advisable for Scheisler to exhibit his claim to avoid inconvenience to himself and the parties interested in the trustee's sale.

Sometime after which the case was again brought before the court.

2d September, 1797.—HANSON, *Chancellor*.—Ordered, that the sale made by Henry Kuhn, trustee of the real estate of Christian Baker deceased, as stated in his report here filed, be absolutely ratified and confirmed, no cause to the contrary, &c. although notice, &c.

Ordered likewise, that of the money arising from the said sale there be applied the sum of £14 13*s*. 0*d*., for the costs of this suit as taxed by the register; that out of the said money there be allowed to the trustee, for his whole trouble and expense incurred, or to be incurred, in the discharge of his office, the sum of £36; that there be paid to the following creditors of the said deceased the sums of money set opposite to their names, with interest thereon from August 20th, 1796, to the time of payment.

Conrad Doll - - - - - - - £121 16*s*. 9*d*

(Then follows a list of twenty-three others.)

Ordered, that the said trustee, on the receipt of money from any of the purchasers of the aforesaid real estate, either immediately deposit the same in this court, agreeably to the directions of the decree; or without delay, distribute the same amongst the creditors aforesaid, according to their claims. And the attested written receipt of any of the said creditors shall be admitted in this court instead of so much money directed to be brought in.

Ordered, that the surplus of the money arising from the said sale remaining, after discharging the several sums herein before directed to be paid, shall be subject to the future order of this court.

After which, the vendor, Jacob Scheisler, having presented his claim against the estate of the deceased, the case was again brought before the court.

sions.(*x*) And where the sale, made by the trustee, had been set aside without any blame having been imputed to him, and afterwards another trustee had been employed who had made sale of the same property, the first trustee was allowed half commissions.(*y*) And where the trustee, after having made sale of a part of the property, had removed beyond the jurisdiction of the court, he was allowed a commission of one and a half *per cent.*(*z*) And where the trustee, after having made the sale, died before he had reported it to the court, two-thirds of the commissions were awarded to his representatives, and one-third to his successor, by whom the sale had been reported and completed.(*a*) No general rule has, however, been laid down in any of these cases, and perhaps none can be established in regard to this matter; the circumstances of each case being so peculiar, that each, as it occurs, must be submitted to the sound discretion of the court upon its own particular merits.

In some cases the fund may, to a certain extent, be burthened with double commissions, as in this instance; where the trustee dies after having actually received an amount of the proceeds of

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22*d August*, 1798.—Hanson, *Chancellor*.—Ordered, that of the money to arise from the sale of the real estate of the said Christian Baker, there be paid to the following persons, whose claims have been exhibited since the passage of the order for the application of part of said money, the sums set opposite to their names, with interest from the respective dates to the said sums annexed to the time of payment.

Matthias Buckey	- - -	£ 3 1*s.* 8*d.* Oct. 7th, 1793.
Jacob Scheisler	- - -	50 0*s.* 0*d.* May 1st, 1793.
Jacob Baltzell	- - -	75 0*s.* 0*d.* Oct. 8th, 1797.

It appears on calculation, that the money to arise from the sale, (provided the purchasers shall all fully discharge their bonds,) will be more than sufficient to discharge the costs, commission already allowed, and claims against the said Baker, directed by the former and present order, to be paid. In consideration of the extraordinary trouble already, and to be incurred by the trustee, it is further ordered, that he be allowed, in addition to the aforesaid commission, whatever surplus of the purchase money may remain, after fully discharging the costs, and all the claims against the said Baker, with interest, directed by the present and former order, to be paid; provided he shall prepare or have prepared, at his own expense, deeds to be executed by the aforesaid Scheisler and Baltzell, conveying unto him and his heirs the land, by them contracted to be conveyed to the aforesaid Baker, in trust, that he shall convey the same to the purchaser, or purchasers thereof under the original decree in this cause; or provided he shall procure conveyances from the said Scheisler and Baltzell to the said purchaser or purchasers after his receipt of the whole purchase money.

N. B. It may be proper for the said Scheisler and Baltzell to join the trustee in his conveyance to the purchasers.

(*x*) Carroll *v.* Jones, MS., 14th September, 1821.—(*y*) Lawson *v.* The State, MS., 3d July, 1810.—(*z*) Berry's Case, MS., 14th May, 1803.—(*a*) Selby *v.* Selby, MS., 1st May, 1819.

sale equal to the sum allowed to him as commissions upon the whole, by a previous order of the court. In such case the court cannot revoke its order, merely because of the death of the trustee; and, therefore, the only mode in which this double charge could be prevented or corrected, would be to alter the practice, so as to postpone the payment of the trustee's commission until the whole of his duties had been performed, or to authorize summary proceedings to be instituted, to make his representatives refund in part, with which the succeeding trustee may be compensated for his trouble in collecting the balance. Under such circumstances, it seems to be fair, by way of analogy to the rule laid down by the legislature in regard to sheriffs, and others,(*b*) to apportion the commission or poundage, where it can be done, between the preceding and succeeding trustee according to the sum which each may have collected, or on a consideration of the trouble and merits of each. But in this case the fund has been already charged with full commissions; and therefore should not now be again charged with more than a necessary recompense to the present trustee for his trouble; which in this, as in all similar cases, must be regulated according to the services actually rendered.

Whereupon, it is ordered, that this trustee be and he is hereby allowed half commissions on the amount stated to have been received by him.

McKIM *v.* THOMPSON.

To obtain an order upon a defendant to bring money into court, before the final hearing, it must appear, that he who asks for such an order has an interest in the money proposed to be called in; and that he who has it in his hands has no equitable right to it; and the facts from which this appears must be found in the case as it then stands, either admitted or so established as to be open to no further controversy at any subsequent stage of the proceedings.

A defendant cannot be allowed to put in a supplemental answer, except under very special circumstances.

An appeal does not lie from a mere interlocutory order, by which nothing is finally settled between the parties.

The case referred, and a decree upon the award.

It appears, that *Marcus Heyland*, for the purpose of carrying on the business of a merchant in the city of Baltimore, went to Eng-

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(*b*) 1795, ch. 88, s. 6; 1813, ch. 102, s. 5; Bac. Abr. tit. Sheriff (I).

land, and there, in the year 1810, purchased of sundry persons goods to the amount of about $67,000; and, to secure the payment for them, drew bills in favour of those from whom he purchased, on *William & John Bell & Co.* which they accepted; that some time after, *William Bell* died, and *John Bell*, by a letter of the 10th November, 1810, informed *Heyland*, that, in consequence of the death of his partner and other circumstances, his late firm had become somewhat deranged, and that he had made over all the amount due by him for those acceptances to *Hugh Thompson* of the city of Baltimore, which he was requested to notice, and to account with *Thompson* accordingly. In consequence of which, on the 20th of November, 1810, *Heyland* entered into an agreement, by which he bound himself to *Thompson* to the amount of what he should owe to the firm of *William & John Bell & Co.*, on account of their acceptances on his behalf, or otherwise, on the fate of those acceptances being known in this country. But, not being entirely satisfied with this arrangement, *Heyland* and *Thompson*, on the 8th of January, 1811, made and executed the following agreement:—

"Whereas *Marcus Heyland*, of the city of Baltimore, merchant, being indebted unto divers persons in England, for goods and merchandise purchased of them, heretofore drew certain bills of exchange in favour of those persons respectively, upon the house of *William & John Bell & Co.*, merchants of London, to amount of sixteen thousand pounds, sterling money, or thereabouts; which bills it is believed have been accepted, but the periods for their payment not having yet arrived, it is not known whether the said bills will, or will not, be paid at maturity. And whereas *John Bell*, of Petersburg, in the State of Virginia, merchant, one of the persons composing the aforesaid house of *William & John Bell & Co.*, by his letters in behalf of himself and of his aforesaid house, bearing date at Petersburg aforesaid, the tenth day of November last, and addressed to the said *Marcus Heyland*, stating that he had transferred and made over all the amount due by the said *Heyland* for the goods which the said house of *William & John Bell & Co.* accepted to pay on his account, to *Hugh Thompson* of the city of Baltimore, merchant,—did request the said *Marcus Heyland* to notice the same, and to account with the said *Hugh Thompson*, therefor, accordingly: thereby stipulating that his, the said *Hugh Thompson's*, receipts or discharges of any kind should be valid against the said *John Bell*, or the house of *William & John*

Bell, or the house of *William & John Bell & Co.*, to the full amount of what the said *Marcus Heyland* might owe or stand indebted to the said house. *Now these presents therefore witness*, that in consideration of the premises before recited, the said *Marcus Heyland* doth hereby acknowledge himself, his heirs, executors, and administrators, to be and stand bound unto the said *Hugh Thompson*, his executors, administrators, and assigns, in and for such balance, or sum of money as shall or may be found to be due, or owing from the said *Marcus Heyland* to the aforesaid house of *William & John Bell & Co.*, on account of the transaction before alluded to, or otherwise, to the time of executing these presents; and doth hereby covenant and agree to and with the said *Hugh Thompson*, that he, the said *Marcus Heyland*, shall and will immediately after the execution of these presents, proceed to account with the said *Hugh Thompson* for, and pay to him, the amount of the aforesaid acceptances, in the same manner as if it were ascertained that they had been duly honoured and paid by the said *William & John Bell & Co.;* and the said *Hugh Thompson* doth hereby covenant, and oblige himself and the said house of *William & John Bell & Co.*, in pursuance of the authority vested in him for that purpose, to allow to the said *Marcus Heyland* the benefit of the current exchange, on all payments made by him on the account aforesaid; and further doth hereby bind and oblige himself to indemnify the said *Marcus Heyland* from and against all claims and demands, that may be rightfully made against him for, or on account of the said acceptances, either by the said *William & John Bell & Co.*, or by the respective holders of the said acceptances, to an amount equal to the sum which may be paid over to the said *Hugh Thompson* in virtue of this arrangement. In testimony whereof the said *Marcus Heyland* and *Hugh Thompson* have hereunto subscribed their names and affixed their seals, on the eighth day of January, in the year of our Lord one thousand eight hundred and eleven."

It further appears, that, subsequent to these agreements, *Heyland* did, at various times, between the 5th of March and the 13th of September, 1811, pay to *Thompson*, the sum of £8889 5*s.* 4*d.* sterling; that the bills, drawn by *Heyland*, had been protested for non payment, and then remained unpaid. And it further appears, that, some short time before April, 1812, *Heyland* failed, and obtained the benefit of the insolvent laws of this State; and that *John McKim, jun'r*, and *Thomas L. Emory, jun'r*, were appointed

trustees for the benefit of his creditors, to whom he conveyed all his property accordingly.

Upon these circumstances, the trustees, *McKim* and *Emory*, together with *The British Copper Company*, and others, holders of the bills drawn by *Heyland*, on the 22d of September, 1812, instituted this suit against *Hugh Thompson* and *John Bell*, the surviving partner in this country of *William & John Bell & Co.* They alleged, *that the sums of money received by Thompson from Heyland, as shewn by their exhibit E, amounted to the sum of* £8889 5*s.* 4*d. sterling;* and prayed, that *Thompson* might be decreed to pay over to the trustees, *McKim* and *Emory*, for the benefit of the bill holders, and others, the creditors of *Heyland*, the amount received by him: and for general relief, &c.

On the 27th February, 1813, the defendant, *Hugh Thompson*, filed his answer, in which he admits, that the bills drawn by *Heyland*, were accepted as stated; that the agreement of the 20th November, 1810, and that of the 8th January, 1811, were made and executed as stated. And he then answers in these words:— "This defendant avers, that the said agreement, bearing date the 8th January, 1811, was executed at the instance of *Heyland;* but this defendant denies that it was the intention of the said agreement, or the understanding of the parties, or of the counsel employed by them to reduce it into form, that *Heyland* should be entitled to indemnity, unless his payments to defendant should exceed the debt which should be actually due from *Heyland* to the house of *Bell & Co.* The true purpose of the agreement being, that as *Heyland* did not exactly know the amount which *Bell & Co.* had paid, or might pay for him, he should be secure of a restoration from this defendant of the surplus of his payments, if any such there should be; and the language of the agreement does, as this defendant apprehends, indicate, with sufficient explicitness, that object, which only this defendant could have had any rational motive for acceding to, or the said *Heyland* could, with any appearance of justice or propriety, propose to him."

And this defendant further answered, in these words: "That he does know *Marcus Heyland* to be insolvent, and a bankrupt; that he has reason to believe, that the affairs of the house of *William & John Bell & Co.* have been, and continue to be, somewhat deranged. But he is well informed, that the high and improving prices of American produce in England, in consequence of the war

between that country and the United States, have greatly restored the declining affairs of that house. *Defendant did receive from Marcus Heyland the sum of money mentioned in complainant's bill.* Defendant did enter into certain agreements with *Heyland*, as heretofore explained in this answer. That at the time the money was paid into his hands by *Heyland*, defendant did not expect it would be appropriated to the payment of *Heyland's* creditors in England. Defendant denies, that said money was a deposit in his hands for the use and benefit of *Heyland's* creditors in England."

On the 16th of July, 1821, the defendant, *John Bell*, filed his answer; in which he admits, in substance, all the circumstances as set forth by the plaintiffs; and insists, that the money paid over by *Heyland* to *Thompson*, under the agreement of the 8th January, 1811, was intended to be, and should be, first applied in satisfaction of those bills drawn by *Heyland*.

The plaintiffs, by their petition, referring to the previous proceedings, by which it appeared, that the defendant, *Thompson*, had received from *Heyland*, (who was then dead,) the sum of £8889 5*s*. 4*d*. sterling, for the benefit of the plaintiffs, prayed, that he should be ordered to bring that sum, with interest, into court, to be applied and distributed under the direction of the Chancellor.

14*th December*, 1822.—JOHNSON, *Chancellor*.—Ordered, That *Hugh Thompson*, the trustee in the petition named, bring into this court the sum of money mentioned, on or before the 15th day of January next, or shew good cause why the same should not be brought in: Provided a copy of the petition, and of this order, are served on him before the last day of this month.

It appears that the service was made as required.

10*th May*, 1823.—JOHNSON, *Chancellor*.—On the application of the complainants, it is Ordered, that on the hearing of the motion made for the purpose of compelling the defendant to bring money into court, that depositions taken before a Justice of the Peace of Baltimore, on three days' notice, be read in evidence; and, that the complainants be at liberty to prove the contents of any original paper or papers, as well as the entries contained in a book or books in the possession of the defendant; the defendant having first had notice, in writing, three days before the evidence is taken, to

produce such paper or papers, book or books: and that the motion be heard during the next term.

Under this order, proofs were collected and returned. The hearing of this matter was, by consent, or from other causes, from time to time postponed. The defendant, *Thompson*, having prepared and sworn to a supplemental answer on the 21st February, 1823, moved for leave to introduce it at once into the case, without shewing why the matter, therein stated, had not been set forth in his original answer; but he was not allowed thus to file it. Afterwards, on the 31st of January, 1825, the defendant, *Thompson*, filed a petition, on oath, in which he stated, that he had, through inadvertence in one instance, and for want of a knowledge of some facts, in other respects, as to which he had since obtained full information, misstated several circumstances in his answer, all of which he prayed leave to correct by a supplemental answer. No order was passed on this application; but, soon after it was filed, the parties were heard on the order of the 14th of December, 1822.

12*th February*, 1825.—BLAND, *Chancellor*.—The arguments of counsel, on this petition, to obtain an order commanding *Hugh Thompson* to bring a certain sum of money into court, have been heard and duly weighed, and the proceedings in the cause have been attentively read and considered.

This practice of ordering money to be brought into court, is one of very late origin. Lord *Eldon* is reported to have said in 1803, "I remember when the practice was introduced of making a defendant pay in money, appearing, by his answer or examination, to be in his hands."(*a*) But it seems to have been attended with so many beneficial consequences, to have been so often resorted to, and so many of the cases have been reported, that the principles of the rule by which the court is now governed may be considered as fairly and fully developed. In the investigation of the principles applicable to this petition or motion, as indeed in relation to every other legal inquiry, we should particularly bear in mind, that it is the *reason* and *spirit* of cases make the law; not the *letter* of particular precedents.(*b*)

It is held to be a fundamental axiom, that the judgment of a court must be the conclusion of law arising from the facts presented

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(*a*) Mills *v.* Hanson, 8 Ves. 91; Gilb. For. Rom. 179.—(*b*) Fisher *v.* Prince, 3 Burr. 1364; Doe dem. Lancashire *v.* Lancashire, 5 T. R. 62.

to it. And in the application of this maxim, there is nothing peculiar in the character of the court, or in the mode of judicial proceeding, by which it can be at all affected or varied. It is a fundamental principle applicable to all courts, and from which none are allowed to depart. The judgment of a court of law is the legal result of the facts admitted by the parties, or found by the jury: and so too, the decree of a court of chancery is the result, according to principles of equity, arising from the facts found in the bill, answer, proceedings and proofs. Such is the acknowledged foundation of all final and general judgments or decrees.(*c*)

But interlocutory orders and decrees affecting rights, must, so far as they go, have a similar basis; because, no court of judicature can arbitrarily make a *partial*, any more than a *total* disposition of the rights of things or persons, without such a foundation. The judge can go no farther than to apply the rule to the case, or to pronounce the law upon the facts, either partially or wholly. It is of the very nature of judicial power to be so limited. It is, however, of no importance, as regards this principle, how the facts are made to appear, or in what shape they are presented to the tribunal; whether by confession; by arithmetical calculation; by necessary deduction; or by positive and direct proof. It is enough that the facts are so placed before the tribunal as to preclude all further denial of them. The court may then be called on, in cases like this, to pass an order, or, in other words, to pronounce the equity resulting from the facts. Such are the elementary principles. Let us now bring them near to the case under consideration.

In cases of this sort, it is not necessary that the party moving for the order, should shew an unquestionable right to a part, or to the whole of the money proposed to be called in. It is enough, that he shews an interest in the safety and final disposition of the funds. The general rule is, that the plaintiff is solely entitled to the fund, or has acquired, in the whole of it, such an interest, together with others, as entitles him, in his own behalf, and the behalf of those others, to have the fund secured in court.(*d*)

A motion, by a party interested, to order money to be brought into court, can only be founded upon the allegation, that the clear conclusion of law from the fact is, that the person, proposed to be called on, has no right or title whatever to hold the money of which he has the possession. And, therefore, the first inquiry is, are there

(*c*) Gilb. For. Rom. 35.—(*d*) Freeman *v.* Fairlie, 3 Meriv. 29.

any facts, then to be found in the cause, warranting such a conclusion? and next; if there are, can the party be allowed, at any future stage of the proceedings, to contradict, or explain them away? It is not necessary to shew, that the person called on is a mere trustee, without any legal control over the fund: it is sufficient, if it appear that he has no equitable right or title to the money he is called upon to produce. As where an executor admitted a balance in his hands, but alleged, that an action at law was then depending against him, and insisted, that the fund should not be taken out of his hands while he so remained liable to be called on. But the court ordered in the whole balance; and, on a recovery being had, the money was ordered to be paid to the plaintiff in the action, and not to the executor.(*e*)

It is said, in the books, that orders of this kind were originally confined to cases where the facts were expressly admitted in the defendant's answer. It is easy to imagine, that their propriety was originally suggested by cases of that obvious and unequivocal character; but the court, having been made acquainted with their beneficial consequences, soon perceived the principle on which they were based; and in a short time threw aside the anomalous and technical notions about the necessity of finding the facts expressly admitted in the answer.

In the case of *Freeman* and *Fairlie*,(*f*) which was so cogently pressed upon the attention of the court by both parties, Lord *Eldon* says, "I think it right to say that, *under all circumstances*, I can take the personal estate to have been in 1791, £2000, and that I may add the accumulations to 1812; *but I have not in this answer any distinct admission*, that he has laid out the money in East India securities, in such a way as to enable me to ascertain and order him to bring in what is the fair amount of the personal estate." And in conclusion, the Chancellor ordered the defendant to bring in the sum of £3680; whence it is clear, that he felt himself at liberty to go as far in pronouncing the conclusion of law from the facts, as those facts were then, and in that stage of the case, established, and open to no contradiction or explanation in the course of the subsequent proceedings. For, although the Chancellor took much pains to shew, that the defendant had, by

(*e*) Yare *v.* Harrison, 2 Cox. 377; Mortlock *v.* Leathes, 2 Meriv. 491; Strange *v.* Harris, 3 Bro. C. C. 365; Blake *v.* Blake, 2 Scho. & Lefr. 26; Rutherford *v.* Dawson, 2 Ball & B. 17; Yates *v.* Farebrother, 4 Mad. 239; Johnson *v.* Aston, 1 Sim. & Stu. 73; Rothwell *v.* Rothwell, 2 Sim. & Stu. 217.—(*f*) 3 Meriv. 29.

his own answer, covered himself with shame; yet the order went no further than the incontrovertible facts would fairly warrant; or, as the Chancellor says, "under all circumstances." Hence, if the statements, allegations, and then situation of the case, in relation to the motion, are of such a nature as to leave the matter open to be affected by the proofs to be adduced at the final hearing, the court cannot pass any interlocutory order or decree whatever on the subject.(*g*)

But in the case of *Freeman* and *Fairlie*, the facts appear to have been deduced, under all circumstances, from the answer itself. The first step taken to find facts beyond, but in the immediate precincts of the answer, was, where a schedule was referred to in the answer as containing a correct statement; the items of which schedule, if added up, would shew the sum admitted to be due. Such a form of admission was, therefore, held to establish the facts as unequivocally as if the sum had been distinctly specified in the answer itself. This position necessarily comprehended another case, going apparently one step further, but which was, in fact, precisely the same in principle; that is, where the party referred in his answer to, and produced a set of books of account, and alleged, that they contained a true statement of facts. If, on referring them to the auditor, he reports, that they shew a certain amount to be in the defendant's hands, it will be considered as an indirect, but sufficient admission of such fact; and the court will order the money to be brought in.(*h*) But, if no distinct fact can be deduced from the answer itself, laying a foundation for such a motion, and the case is referred to the auditor, and the party, on his examination there, makes admissions of such facts, they will be considered as binding and conclusive as if made in the answer itself. So much, then, for the direct and indirect statements and admissions of the party himself.(*i*)

There are other cases, which shew that the court has gone much further with the principle, and distinctly manifested a disposition to follow it out in all its bearings. For, where a controverted case of accounts had been referred to the auditor to adjust, and the parties had there fully contested the matter, and the report of the

(*g*) Strange *v.* Harris, 3 Bro. C. C. 365; Peacham *v.* Daw, 6 Mad. 98.—(*h*) Mills *v.* Hanson, 8 Ves. 68, 91; Hatch *v.* ——, 19 Ves. 116; Wood *v.* Downes, 1 Ves. & Bea. 49; Roe *v.* Gudgeon, Coop. Rep. 304.—(*i*) Quarrell *v.* Beckford, 14 Ves. 177; Vigrass *v.* Binfield, 3 Mad. 62.

auditor shewed a balance in the defendant's hands, to which he was not entitled: in such case, after the time allowed to except to it, had expired; and after it had been confirmed, an order was granted to have the money brought into court.(*j*) And this not on the ground of any *admission* of the party; for the truth might have been, that he contested every item and every point before the auditor; but upon the ground, that the court was presented with facts in that stage of the case, which had been established in a due course of judicial proceeding, which could not thereafter be, in any manner, questioned or denied by the same party; for an order confirming a report of the auditor is, in this respect, a judgment of the court.(*k*)

The objects and inducements for making an interlocutory order, or partial decision of this kind, are to remove the fund out of danger; to place it in a state of the greatest security for the benefit of all concerned; and, by circumscribing the field of controversy, to accelerate the further progress of the case, and save costs; since it is evident, the parties will spin it out while they have the advantage of keeping the money.(*l*)

Hence it appears, that those who make this motion, must shew, that, however much more may be due, they have an *interest* in the sum of money proposed to be called in; and that he who holds it in his possession, has no equitable right or title to it whatever. And the facts on which these positions are to be based, must be found in the case as it then stands, either admitted, or so estab-

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(*j*) Gordon *v.* Rothley, 3 Ves. 572; Fox *v.* Mackreth, 3 Bro. C. C. 45.

(*k*) Brown *v.* Barkham, 1 P. Will. 653.

TAYLOR *v.* WOOD—*25th July*, 1815.—KILTY, *Chancellor*.—The report of the auditor in this case was filed on the 25th of March last, and having laid during the present term without any exception being filed thereto, is liable to be confirmed, or otherwise acted on without further notice. And it is now taken up, on motion of the complainant. The balance reported as due from or in the hands of the defendants, Owens & Smith, is $13,925 29. Against this there are some further credits, which are extended, but not yet established or allowed, which, if allowed, would reduce the balance to $11,837 35.

On the present state of the accounts, it is Ordered, that the said Owens & Smith do forthwith deposit in the Farmers Bank of Maryland, to the credit of the estate of William Robb, the sum of $13,337 35, which will be liable to a deduction and return of the further credits for expenses and commission, if allowed, and also the sum of $1509, claimed on account of A. Stewart, if established. The balance then remaining will be subject to the order of the court, on a further report to be made by the auditor as to the claim of the creditors, including the defendants.

(*l*) Roberts *v.* Hartley, 1 Bro. C. C. 56; Gordon *v.* Rothley, 3 Ves. 572.

lished as to be open to no further controversy at any subsequent stage of the proceedings.(*m*)

These principles being settled, the next inquiry is, how far the court may allow itself to range through this case in search of those facts, which are to be thus taken as admitted or established. The plaintiffs contend, that the answer of a co-defendant, and certain exhibits and proofs, taken in express reference to this motion, should be read and considered. On the other hand, the defendant *Thompson* urges, that the very satisfactory explanations of what he calls his supplemental answer; or at least, that matter stated in his petition, filed on the 31st of January last, as the substance of a supplemental answer, which he ought to be permitted now to file, should be taken into view. All these matters must be disposed of before we can safely undertake to bring together what may be considered as the admitted, or established facts in relation to this motion.

The answer of the defendant *John Bell*, it has been urged, may be resorted to, as belonging to the *res gesta*, to the same subject, either as direct evidence, or for explanation, or illustration. It is, in general, true, that the answer of one defendant cannot be used as evidence for or against another defendant. Whatever may be the extent of the exceptions to this rule, none of them embrace this case;(*n*) for it is very clear, that *Thompson* has made no reference to, nor admitted any thing which *John Bell* has said in his answer: nor has the truth of any one of *John Bell's* allegations been put in issue, before the auditor, or otherwise, and conclusively established against *Thompson*. The answer of *John Bell*, the co-defendant, cannot, therefore, be allowed to furnish any of those facts on which the decision of the court must be founded on this motion.

The plaintiffs have also directed the attention of the court to the exhibits and proofs taken, under the order of the 10th of May last, in reference to this motion, and have contended, that, in cases like this, proofs of collateral facts and circumstances may be introduced. But the authorities relied on to sustain this position, point to an important distinction in the classification of cases of this nature.

(*m*) Montgomery *v.* Clark, 2 Atk. 378; Rogers *v.* Rogers, 1 Anstr. 174; Quarrell *v.* Beckford, 14 Ves. 177; Vigrass *v.* Binfield, 3 Mad. 62; Rothwell *v.* Rothwell, 2 Sim. & Stu. 217.—(*n*) Osborn *v.* U. S. Bank, 9 Wheat. 832; Field *v.* Holland, 6 Cran. 24.

In cases between vendors and purchasers of real estate, the purshaser, who is not in possession, cannot be called upon to pay in the purchase money until the title is completed; nor will the mere fact of his taking possession, entitle the vendor to call upon him for the payment of the purchase money into court. But if the purchaser, being in possession, exercises acts of ownership, he may be compelled to pay the purchase money into court. And the taking possession, and the acts of ownership, though not mentioned in the bill or answer, are the collateral facts which may be shewn by affidavits, or by proofs taken in a manner similar to those offered upon the present occasion. But, in such cases, that the purchase money is due, and the amount, are facts admitted and established; and whether it should be immediately brought in, or whether the purchaser should be indulged until final hearing, or how much short of that, are questions which depend upon equitable circumstances, not necessarily involved in the principal controversy, that never would be brought into view, but by such a motion. They are, therefore, truly and properly collateral circumstances.

But, in this case, the question is, whether, in the *direct* progress of a case, it has been established or admitted, that a party holding money has no title to it; and is, therefore, liable to be called on in this way. In this class of cases, it is a part of the principal matter in controversy—one of the circumstances of it; as much so as, in the other class, between vendor and purchaser, whether the purchase money was really due or not. And being necessarily involved in the main question, the court will not stop or delay the regular progress of the case to investigate or establish it by affidavits or proofs taken out of the regular order. The proof of possession, and the acts of ownership, lay the foundation of that equity which entitles the vendor to make the call for his money sooner than he otherwise could do; and, in that class of cases, it is said to be now quite decided, that, upon motions of this sort, affidavits of such collateral circumstances may be read, and that it was a practice to be encouraged, as it shortened pleading.(*o*)

But there is an obvious distinction between such collateral circumstances and peculiar equity, and the admission or establishment of facts, which go to shew the real title to the fund proposed

(*o*) Clarke *v.* Wilson, 15 Ves. 317; Cutler *v.* Simons, 2 Meriv. 103; Morgan *v.* Shaw, 2 Meriv. 138; Crutchley *v.* Jerningham, 2 Meriv. 502; Bramley *v.* Teal, 3 Mad. 219; Wickham *v.* Evered, 4 Mad. 53; Blackburn *v.* Starr, 6 Mad. 69; Wynne *v.* Griffith, 1 Sim. & Stu. 147; Gill *v.* Watson, 2 Sim. & Stu. 402.

to be called in. Therefore, the proofs and exhibits that have been taken and brought in under the order of the 10th of May last, must, upon the present occasion, be laid aside as altogether inadmissible.

Having thus disposed of the proffered auxiliaries of the plaintiffs, let us now take a review of those tendered by the defendant *Thompson*. He insists, that a certain paper he has presented as a supplemental answer, ought to be considered as an amended answer, or that he ought now to be permitted to file a supplemental answer as prayed by his petition.

It is with great difficulty permitted to a defendant to make any alteration in his answer, even upon a mistake. And there is no instance of its having been allowed for the purpose of retracting a clear and well understood admission.(*p*) It should appear due to general justice to permit the issue to be altered. The rule upon this subject is, that the defendant must move to put in a supplemental answer, and accompany the motion with an affidavit, in which he must swear, that when he put in the answer, he did not know the circumstances upon which he applies, or any other circumstances upon which he ought to have stated the fact otherwise, or that when he swore to his original answer, he meant to swear in the sense in which he now desires to be at liberty to swear.(*q*)

The paper tendered as an amended answer, comes within no part of this rule. It is silent as to the causes which occasioned him to omit mentioning the new matter, therein contained, in his original answer; nor does it say any thing of his not knowing of the new circumstances therein disclosed. It, in fact, purports to be a mere additional or amended answer, proposed to be put on file with the leave of the court, without any previous affidavit, attempting to account for the mistakes or omissions proposed to be corrected or supplied. It must, therefore, be altogether rejected.

But this defendant has now filed his petition, on oath, in a formal manner, praying for leave to file a supplemental answer. This petition points out, with sufficient certainty, that which the petitioner alleges was a mistake as to the time of receiving the money first spoken of in his answer. But that part of the answer, which is thus designated as erroneous, is too indefinite and obscure to lay the foundation of such an order as is asked for by the present motion. It speaks of "considerable payments," without specifying whether they were made in bills, or cash, or what was the amount

(*p*) Pearce *v.* Grove, 3 Atk. 522.—(*q*) Livesey *v.* Wilson, 1 Ves. & Bea. 149.

of all or any of them; nor does that part of the answer make a reference to any other document by which the uncertainty might be removed. Therefore, as regards the present motion, whether the answer is suffered to remain as it now does, or is corrected, as proposed, is of no kind of importance.

The Chancellor deems it unnecessary now to decide, whether a supplemental answer should or should not be allowed to be filed to correct this alleged mistake, in reference to the final hearing; since the subject was not distinctly argued and presented to the court with that view.

The second and third class of errors and corrections, stated and prayed for, are of the same character, and the same observations will apply to both. The defendant admits he knew, at the time he answered, that all right or claim which he could, in any manner, make to the moneys received from *Heyland*, could only be derived from the deeds which had been previously made and entered into between him and *Heyland*. He does not pretend to have received any money from *Heyland*, in any way, except under and by virtue of those contracts; consequently, his right to hold and apply it, can only be derived from them. His answer distinctly enough states what he believed to be his rights, as well with regard to the then state of things, so far as they were known to him, as with reference to all other and future occurrences. If these contracts authorized *Thompson* to hold the fund, in any way, for his own use, the original answer, in which he has, by explicit reference, embodied those contracts, as a part of it, with suitable and apt words for that purpose, contains all that is substantially necessary for his defence; and, consequently, those after extensions of *Thompson's* liability, and subsequent ascertainment of the amount of his claim upon the *Bells*, spoken of in his petition, are more proper and fit subjects for proof and adjustment, on the final hearing, than of a supplemental answer.

A supplemental answer is only intended to correct the allegations of the original answer, or to remove from it dangerous admissions, so as to let in proof on the hearing of the real merits of the case. In this case all the merits are, on this motion at least, to be derived from the contracts; and the answer covers the whole ground over which those contracts can in any way be extended: consequently, it is in all respects coextensive with all the real merits of the case in every shape whatever; and, therefore, the supplemental answer prayed for cannot be allowed.

While we are in the way of removing or rejecting matters entirely extraneous from the question now under consideration, it may be well to observe, that although the letter of the 10th of November, from *John Bell* to *Heyland*, may be used between the *Bells* and *Thompson*, and shews the inducement for entering into the two deeds between *Heyland* and *Thompson;* yet, as it cannot be allowed to control or contradict those deeds, it must, upon the present occasion, be entirely laid aside.

Having removed from about this motion, all matters which do not properly belong to it, let us now see how the case stands in its simple and reduced form. It is this:—The trustees for all the creditors of *Marcus Heyland*, appointed under the insolvent laws of this State, together with sundry of his specified creditors, now move the court to order *Hugh Thompson*, a defendant, to bring into court the sum of *eight thousand eight hundred and eighty-nine pounds, five shillings and four pence*, sterling money of England, which he had received at various times between the 5th of March, 1811, and the 13th of September following, as specified in the exhibit E, referred to in their bill. Which sum of money, they charge, was received under and by virtue of the last mentioned of the two deeds entered into between *Heyland* and *Thompson*, the one dated on the 20th of November, 1810, and the other bearing date on the 8th of January, 1811. To this *Thompson* answers and admits, that the persons named in the bill are the creditors of *Heyland*, as stated, and that the two deeds were made and entered into as stated; but he denies, that the second was intended to cancel or supersede the first. And, after making sundry allegations about the true intent, and the proper interpretation of those contracts, and his right to hold and apply the money received under them, to his own use, he then makes a direct answer to the bill as to the money which it alleges to have been received by him as stated in the exhibit E, in these words: "*Defendant did receive from Marcus Heyland, the sums of money mentioned in complainant's bill.*" And further, "that at the time the money was paid into his hands by *Heyland*, defendant did not expect it would be appropriated to the payment of *Heyland's* creditors in England."

The true construction of written contracts is a matter which belongs exclusively to the Chancellor: no parol proof can be admitted to explain them, unless in cases of latent ambiguity. No such ambiguity exists in the present case. Therefore, all the facts relative to *Thompson's* right and title to the money which he

acknowledges he has received from *Heyland*, are as fully before the court *now* as they can be at any future stage of the case, or at the final hearing. The only opening for any doubt or hesitation is as to the true intent and meaning of those deeds. Let us then consider them carefully.

By that of the 20th of November, 1810, it appears, *Heyland* had become largely indebted to sundry persons for goods purchased of them; that, to secure the payment of those debts, he had drawn bills on the firm of *William & John Bell & Co.*, which they had accepted: who might, therefore, if they paid those bills, become the creditors of *Heyland*, in place of those of whom he bought the goods. After which the *Bells* transferred and made over this eventual and uncertain claim of theirs upon *Heyland*, to *Thompson*. In consideration of which, *Heyland* bound himself, by this contract, to pay to *Thompson* such balance as might be found to be due from him, *Heyland*, to the *Bells*, on account of those transactions, or otherwise, upon the fate of the bills being known, and a fair statement of accounts between *Heyland* and the *Bells*.

This seems to be the clear sense and substance of this first agreement. From which it appears, that *Thompson* was put into the place of the *Bells;* and, consequently, to the extent of their claim upon *Heyland*, became his creditor; and, as such, had a right to the funds which were placed in his hands under *that* agreement. But it is doubtful, from the answer, whether *Thompson* ever received any thing or not under this first agreement exclusively; and, even supposing he had, the amount not being specified, the court could make no order on this motion respecting it.

It appears, however, that the sum specified in the exhibit E, and which is distinctly acknowledged to have been received, came to *Thompson's* hands after the execution of the deed of the 8th of January; and, consequently, must be controlled and regulated according to that contract, and not the first deed of the 20th of November. Hence it becomes necessary to proceed directly to the consideration of the second agreement, dated on the 8th January, 1811.

This contract, after a recital nearly word for word the same, and in sense entirely the same as the first, proceeds to declare, that, in consideration of the premises, *Heyland* is held bound to pay to *Thompson* such balance as might be found due from *Heyland* to the *Bells* on account of those transactions, or otherwise, up to that time; that *Heyland* will immediately proceed to account with and

pay to *Thompson*, *the amount of the aforesaid acceptances in the same manner as if it had been ascertained they had been duly paid by the Bells;* that on all those payments, *Heyland* was to be allowed the current exchange; and, further, that *Thompson should indemnify Heyland, to the amount paid into Thompson's hands by Heyland*, against all demands that might be rightfully made against him *on account of those acceptances, either by the Bells, or by the holders of them.*

By this deed *Heyland* does, most clearly and distinctly, give us to understand, that it was his intention to pay all those of his creditors in whose favour he had drawn bills on the *Bells.* For, with what other possible view could he have stipulated to account with *Thompson* for the whole amount of the bills, as *if* they had been actually paid by the *Bells?* And with what other understanding was the covenant entered into for an indemnity against all those creditors? It is most manifest, therefore, that *Heyland* placed this fund in the hands of *Thompson* for the use of that class of his, *Heyland's*, creditors, the bill holders, whoever they might be.

But, it is alleged that *Thompson* has a title to at least a share of this fund as the assignee of the *Bells;* and this, it is said, is proved by the recital in this deed, in which it is acknowledged, that the *Bells* "had transferred and made over all the amount due by the said *Heyland* for goods which the said house of *William & John Bell & Co.* accepted to pay on his account to *Hugh Thompson;*" and also by the express stipulation, by which *Heyland* bound himself to *Thompson* for such balance as might be found due from him, *Heyland*, to the *Bells*, on account of those transactions, or otherwise, to the time of executing that deed.

This position may, perhaps, be more clearly and strongly presented in another form, thus: *Heyland* stands indebted to sundry persons in the sum, suppose for example, of $16,000, for the payment of which the *Bells* are his sureties; and, as such, they have paid for him $4,000, and consequently stand in the place of his creditors to that amount. But this claim of the *Bells*, having been assigned by them to *Thompson*, he has, thus circuitously, become a creditor of *Heyland* to the amount of that $4,000, part of the original debt of $16,000. Now, says the defendant's counsel, *Thompson* must be allowed to retain at least one-fourth of the fund which has been placed in his hands for the payment of the whole $16,000, since he, in fact, stands in the place of the original creditors to one-fourth of that whole amount.

There is an imposing aspect of equity in this position; and, if the court felt itself at liberty to make free with the positive covenants of the parties, there might be no difficulty in applying its equalizing principles to this case; but the court is not at liberty to reject or impair the covenant of indemnity in this deed of the 8th of January. By that covenant, *Thompson* is bound to save *Heyland* harmless, not merely against the *Bells*, but against all the holders of the acceptances, whoever they may be, to the amount of the funds in his hands. In other words, he is thus constituted a trustee for the bill holders of the funds in his hands, to the amount of the balance remaining due and unpaid on those acceptances: otherwise *Heyland* would not be indemnified against all demands by the bill holders, according to the express terms of this contract. The expressions in this deed, "on account of the transactions before alluded to, or otherwise, to the time of executing these presents," were intended merely to refer to the means of ascertaining the extent of *Heyland's* liability to the bill holders, and the amount of the funds which it was necessary should be placed in *Thompson's* hands, to meet that liability. The great leading object of *Heyland* was to provide for the payment of his *own* debts due to those bill holders. He had nothing to do with the transactions between *Thompson* and the *Bells*, or with the debts due from the one to the other of *them*. The obvious inducement of *Heyland* in making this provision in favour of his bill holders was, some apprehended inability of those who had thus become his sureties to them. Hence, whatever might have been the nature or design of the assignment of the claim on *Heyland* from the *Bells* to *Thompson*, or of any contract between *those* parties, that transfer, or contract, cannot be permitted to control or contradict the positive and clear stipulations contained in this deed of the 8th of January, between *Heyland* and *Thompson*.

In short, the clear and unequivocal objects of this deed, were to place funds in *Thompson's* hands to meet the claims of those of *Heyland's* creditors who should present themselves as the holders of his bills, as therein described; and to obtain an indemnity and discharge for *Heyland* from every part of those claims, so far as those funds would go. But *Thompson* does not pretend that he stands here as a creditor of *Heyland*, in the special character of a holder of all, or any one of the specified acceptances; he is not, by any thing that is alleged or appears, a holder of any one of the designated bills drawn by *Heyland*. It might be, that *Heyland*

looked to other resources to pay the *Bells* any proportion or dividends which they might pay on those acceptances: and this seems plausible. But whatever may have been the intention of the parties as to any matters not comprehended in the deed, that contract, in itself, is clear and unequivocal. The fund in *Thompson's* hands was to be applied to the satisfaction of the demands of certain designated bill holders; *Thompson* is clearly and confessedly not one of them; he has, therefore, no right or title whatever to the money which *Heyland* had placed in his hands for his indemnification against them.

It is, therefore, *Ordered*, that *Hugh Thompson* bring into this court, on or before the fourteenth day of April next, the sum of thirty-nine thousand five hundred and seven dollars and eighty-five cents, being the value of eight thousand eight hundred and eighty-nine pounds, five shillings and four pence, sterling money of England, together with legal interest thereon from the first day of January in the year eighteen hundred and twelve, which sum, it appears by the admitted and incontrovertible facts in this case, he had received from the said *Marcus Heyland* previous to the fourteenth day of September, in the year eighteen hundred and eleven, for the use of said *Heyland's* creditors, as specified in the proceedings in this case; and which the said *Hugh Thompson* ought, within a reasonable time thereafter, to have paid to the said creditors: Provided a copy of this order be served on the said *Thompson*, on or before the twenty-fifth day of the present month. And it is further ordered, that the said sum of money, with the interest thereon, when so brought into court, be deposited in the Farmers Bank of Maryland to the credit of this case, subject to further order.

The defendant *Thompson*, having been advised, that he was not entitled to an appeal from this order, without any previous application to the Chancellor to be allowed to appeal, on the 17th of February, 1825, presented a petition to the Senate, praying that the General Assembly of Maryland would pass a special act allowing him the benefit of an appeal; and the plaintiffs on the next day presented a counter petition to the Senate, which were both together referred to a committee, who on the 23d of February, 1825, made the following report:

"The committee to whom was referred the petition of *Hugh Thompson*, and the counter petition of *John McKim*, jun'r., *Thomas L. Emory*, and others, report—That they have considered the

subject referred to them with the attention which the large pecuniary amount, and the importance of the principles involved in its considerations demand. The petitioner has been proceeded against in chancery by the counter petitioners and others, as a trustee, holding funds which, by the principles of equity, as it is said, he is bound to distribute to sundry creditors of a certain *Marcus Heyland*. The defendant denies the trust alleged, and claims the amount in his hands as due to himself. The Chancellor, by an interlocutory order, has decided, that certain papers filed as exhibits in the cause, prove the trust to exist as alleged, and has directed the fund, amounting to about $70,000, to be brought into court. The petitioner alleges, that the interlocutory order is wholly a manifest violation of the principles of chancery law, in ordering money to be deposited into court by a defendant, claiming title to it, and more especially in adopting such an order as a means of coercion, by which to compel a defendant to a final decision of his cause, without the proof which his counsel may think proper and necessary; but is also injurious to him in the highest degree, without any corresponding benefit to the adverse party, whose interest, it is said, will be promoted by allowing the defendant to give such security as will ensure the prompt payment of the money, with the accumulating interest, at the termination of the cause. With regard to the correctness of the decree or order, the committee intentionally avoid any expression of opinion. The high authority of the Chancellor, and the opinions of the able and distinguished counsel who conduct the cause of the petitioner, are opposed, and the committee gladly avail themselves of the absence of any necessity to pass between them.

"In whatever other respects a difference of opinion is found to exist, it is admitted on all hands, that from an interlocutory order to bring money into court, there is no appeal by the existing laws. Indeed, the nonexistence of such a right, is the sole ground of the application now before the Senate. The question we are called on to determine, is, whether it be advisable to interpose a special legislation to correct an alleged error of the Chancellor. It will at once occur, that the affirmative of this question necessarily involves the previous investigation of the case, and the decision that the Chancellor has erred. It would seem to be obvious, that if a defendant is not injured by a judicial decision, he can with no propriety claim from the legislature a special enactment for his relief.

"The committee cannot believe that it will comport with the separate and independent power, which the Constitution has cautiously secured to the legislative and judicial departments of the government, that the legislature should erect itself into an appellate tribunal for the revision of a judicial opinion. The organization of the legislature, and its mode of proceeding, are certainly by no means calculated to ensure to parties litigant, a correct or intelligent decision. If in the progress of the judicial return, and the developement of legal principles, and their application to peculiar circumstances, they shall be found productive of results which the people of the State deem to be oppressive or inconvenient, it will at all times be the legitimate province of the legislature, to repeal or modify the law. Some of the most salutary provisions of our code have originated from the inconvenient operation of general principles in their application to particular cases. But in this, as in all other instances, individual injury is to be submitted to, when it can only be avoided by endangering the public weal.

"The committee are entirely satisfied, that it will be inconvenient, and may in very many cases be extremely oppressive to defendants in chancery, to be compelled to bring money into court until a final decision upon their claims to it; and still more inconvenience and oppression, they believe, might grow out of the principle, that an order to bring money into court can be used by the Chancellor as a compulsory process, whereby litigant defendants shall be coerced into an early decision of their rights; and they would suggest the propriety of legislation upon the subject. But they still retain the opinion, that injurious as may be the consequences of this decision to the petitioner, yet the mischief of special legislation to interrupt the regular operation of the course of judicial proceeding, and the assumption of powers which by the Constitution have been declared to belong exclusively to an independent department, is of much greater concern to the community. Such a precedent would open the door to the introduction of a class of cases not more to be dreaded by the number, than by the difficulty of distinguishing their various grades. From a state of perfect certainty, through all the intermediate stages of conviction, to a state of perfect doubt, as to the correctness of the judicial decision which shall become the subject of relief, the legislature may expect to find itself called on to execute this portion of its newly assumed power.

"The committee, in all the views in which they have been able to consider this subject, find themselves compelled to adopt the conclusion, that the prayer of the petitioner ought not to be granted. They therefore recommend the adoption of the following resolution:

"*Resolved*, That the petitioner have leave to withdraw his petition."

"Mr. Claude moved to strike out the report, and the question was put and determined in the negative. The question was then put, Will the Senate concur in the report and assent to the resolution? Determined in the affirmative."(*r*)

2*d May*, 1825.—BLAND, *Chancellor*.—In this case the defendant, *Hugh Thompson*, by his counsel, on the 11th of April last, moved the court to grant an appeal from its order of the 12th of February last, and thereupon filed and offered an appeal bond for the approbation of the Chancellor. The motion was permitted to lay over until the plaintiffs could be heard; after which their counsel appeared, and asked to be allowed further time to reply, in writing, to the defendant's motion, which was granted; and on the 28th of the last month, a written argument, on the part of the plaintiffs, in opposition to the motion, was accordingly submitted to the Chancellor. The parties having been thus heard, the motion has been deliberately and maturely considered.

The Chancellor took some pains, after a very careful research into all the authorities within his reach, to explain the reasons and grounds on which he founded the order of the 12th of February last. The greater part of the debatable ground, occupied in the discussion of the motion for that order, was as to its foundation,—as to the kind of admissions, or state of things which would warrant its being made. The court was, therefore, explicit upon that subject. But, whether such an order was interlocutory or final—a "decretal order" or not, was neither mentioned in argument, nor considered by the court. The investigation of the nature of the basis of such an order being a matter of much importance, was however, made with great care; because, upon its being ascertained, whether that basis was solid and uniform, or loose and shifting, depended the very interesting question presented in that argument—whether such orders were likely to be attended with good or ill consequences; or whether they were, or were not capa-

(*r*) The Chancellor's case, post 000.

ble of being used as instruments of oppression? And it was, on finding that the authorities required the most broad and solid foundation, no less clear and strong than that of a final decree itself, that the court was perfectly convinced of their great utility in all cases where there was a proper foundation for making them, and that they were no more capable of being abused, or applied to improper purposes, than final decrees themselves.

But the foundation, or basis of an order, does not determine its effect upon the controversy or the parties. An admitted, or incontrovertible state of facts, is required as the foundation of an order to bring money into court. As the foundation of an order to account, it must appear that a computation is necessary relative to the matter on which the court may be called on to decree; and to lay a proper foundation for an order to pay money out of court, the party claiming it must show a clear title in himself. But no inference can be deduced from the nature of the basis of an order as to its true character, that is, whether it be interlocutory or final, a decretal order, or otherwise. Such questions can only be determined by the order itself, considered in all its relations and bearings upon the parties and upon the case.

Whether an appeal can be allowed, as moved for, must depend altogether upon, whether the order of the 12th of February last is or is not a "decretal order," within the true intent and meaning of the act of 1818, ch. 193, s. 1. The *English* authorities explain, with tolerable accuracy, the difference between interlocutory and final decrees in Chancery, but the phrase, "decretal order," seems to be variously applied, and to have no settled or distinct meaning or application. The term "order" is almost always used in speaking of those general or special directions by which all suits in chancery are governed, controlled, or facilitated throughout, or in the course of their progress from beginning to end; and, the term "decree" is most generally applied to the decisions of the court upon some or all of the rights of the litigating parties. Hence it would seem, that a "decretal order" can only be such an order as finally determines some right between the parties.

But we have a satisfactory and conclusive authority of our own State upon this question. The Court of Appeals, in the case of *Snowden v. Dorsey*,(s) say, "that an appeal will not lie from a mere interlocutory order by which nothing is finally settled between

(s) 6 H. & J. 114.

the parties;" and "which was only preparatory to a final decree, and was liable to be reviewed at pleasure;" or "where nothing is done conclusive upon the Chancellor, but the order remains open, subject to his final disposition, and may be rescinded on motion." Let the order of the 12th of February last be tested by this decision of the Court of Appeals, and every difficulty must be at once removed; it is, upon the face of it, merely preparatory to a final decree,—nothing is done conclusive upon the Chancellor. The order directs, that the money "when so brought into court, be deposited in the *Farmers Bank of Maryland* to the credit of this case, subject to further order." The place of the deposit of the money is ordered to be changed. It is to be made more secure for the benefit of all concerned, subject to be disposed of by any future order, or by the final decree, in such proportions and in such manner as the right and title of the parties shall require. This order, of the 12th of February last, is not then, according to this opinion of the Court of Appeals, a "decretal order." And the construction, thus given by that court, to the phrase "decretal order," in the act of 1818, accords with that which has been always heretofore given to it by this court.

The practice of requiring and giving bond, on an appeal from a decree of the Court of Chancery, was very carefully inquired into and considered, by the Chancellor in *Ringgold's* case;(*t*) and in the course of his investigations in that case, he became perfectly convinced, that there was no legislative enactment of this State relative to appeal bonds from the decrees of the Court of Chancery. The act of 1729 only declares, that the provisions of the act of 1713, on the subject of appeals, so far as they relate "to the prosecution of them," shall apply to chancery cases; and, so far as any thing may be inferred from what was done by the Court of Appeals in the case of *Smith v. Dorsey*, at June term 1824, (for the court gave no reasons for their act,) it appears to be the opinion of that tribunal, that there is no act of assembly requiring a bond to be given on an appeal from the Court of Chancery. But it would be obviously impossible, or very difficult, to apply the provisions of the act of 1713, relative to appeal bonds, on appeals from judgments at common law, to appeals from the multiform and complex decrees of the Court of Chancery. It has, however, been the constant practice to require bond with surety on appeals from

(*t*) Ante, 5.

the Court of Chancery, where the thing decreed would be put or continued in jeopardy, or at risk. The practice upon this subject, as heretofore settled and established, the Chancellor has neither the disposition nor the power to alter in any respect whatever.

But if an appeal would lie from such an order as that of the 12th of February last, and if the Chancellor could, in no case, on an appeal, as in *England*, order the money to be paid into court, to remain there pending the appeal, and if he were bound, as has been contended, by positive legislative provisions to grant the appeal, on the parties entering into bond with approved surety, then it would be utterly futile to ask for, or obtain such an order in any case whatever, even in the plainest and strongest that could be imagined; since the party thus called on could always suspend its execution at pleasure. The order in this case calls on the party to bring the money into court, that the court itself may have it placed in perfect safety for the benefit of all concerned;(*u*) not that he shall merely give security for the payment of it. But if the party could appeal from such an order, and suspend its execution, by giving an appeal bond, then he could, in effect, prevent the court from going farther than barely demanding security for the payment of the money. The consequence of which would be, that such orders would operate partially and not alike upon every citizen; upon those most wealthy and best able to comply, they would be mere cobwebs; but upon those least able to find security they would have their full and just effect; they would operate as rigid injunctions. Upon the whole, the Chancellor is perfectly satisfied that an appeal cannot be allowed, and therefore,

It is ordered, That the motion of *Hugh Thompson*, to grant an appeal from the order of this court, made on the 12th of February last, directing him to bring a certain sum of money into court, as therein set forth, be and the same is hereby overruled and rejected.

After which, on application, and its being shewn that the order of the 12th of February had been served as required, an attachment was ordered against the defendant *Thompson*, returnable forthwith; but it so happened, that the process was never served

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(*u*) It is admitted on all hands, that the court has, in all cases, the power to invest any money in its hands so as to keep it productive pending the litigation; and therefore there can be no ground to object, that if the money were called in, there would necessarily be any great loss of interest in a case like this.—*Latimer v. Hanson*, *ante*, 51.

on him. At the June term of 1825, of the Court of Appeals, the defendant *Thompson* applied to that court for an order prohibiting the Chancellor from proceeding pending the appeal, upon which an order was passed and certified to the Court of Chancery accordingly. As to which, see 6 *H.* & *J.* 321, 334.

The case having abated by the death of *Thompson*, the parties filed an agreement in the Court of Chancery, under which *Robert Oliver*, as executor of *Thompson*, appeared as a party in his stead; and upon which the following order was passed.

24*th January*, 1827.—Bland, *Chancellor*.—Ordered, that this case be and the same is hereby referred to the award and arbitrament of *David B. Ogden* and *Francis S. Key;* and if they differ, to choose a third person, and the award of any two, when filed, to be entered as a decree of this court, according to the terms of the aforegoing agreement.

After which the arbitrators made and filed the following award:

"This cause having been, by the agreement of the parties, and the order of the Chancellor, referred to us, we have examined the record and considered the statements of both parties; and do thereupon make the following award:

"The controversy submitted to our decision by the parties in this case depends upon the construction to be given to the contract of the 8th January, 1811, between *Heyland* and *Thompson*. The preceding contract of 20th November, 1810, and the letter of *John Bell* to *Heyland*, which produced it, the letters of *Hugh Thompson*, and the other evidences of his acts and declarations subsequent to the contract, have been considered by us.

"We are of opinion, that the construction of the contract, which the complainants adopt as the ground of their claim, cannot be sustained. We think it was intended to "assign" to *Thompson*, to secure him for his liability for the *Bells*, whatever *Heyland* owed, or should owe to the *Bells*, for the acceptances they had paid, or should pay for *Heyland;* that it was meant by the parties, that the full amount of the acceptances made by the *Bells* for *Heyland*, should be paid, under that contract, by *Heyland* to *Thompson;* and that *Thompson* should apply what was thus paid, as far as those acceptances should be met by the *Bells*, to secure himself to that amount, and as far as they were not paid by the *Bells*, to pay them. Thus would *Heyland's* indemnity under the contract be complete. What the *Bells* should pay he would be clear of, by the payment, which

they directed to *Thompson;* what the *Bells* should not pay, *Thompson*, out of the funds received from him, was to pay.

"What *Thompson* received under this contract from *Heyland*, was £8889 5*s.* 4*d.*, and his engagement was to indemnify *Heyland* from claims by the *Bells*, or the bill holders, "to an amount equal to the sum which might be paid over to the said *Thompson* by virtue of said arrangement." We therefore consider, that if it appears, that the *Bells* paid on account of those acceptances, an amount equal to the sum received by *Thompson* from *Heyland;* and if it further appears, that *Thompson* is liable for, or has paid, on account of his engagements for the *Bells*, an amount equal to what he has received from *Heyland*, he has complied with the contract.

"The first appears to be admitted. The sums paid to the bill holders by the *Bells*, amount to a greater sum. *Thompson's* account against the *Bells* shews an amount due to him greatly exceeding the sum paid him by *Heyland.* The bills of the *Whittles* and *Tucker*, (notarial copies of which are admitted,) amount, with damages and costs, to about that sum. These bills *Thompson* had endorsed and taken up, and the *Bells* were liable to him on them, and it was for them, it appears, he entered into the liability; to them he had a right to look; and although there is an expression in one of his letters, that he meant *first* to get the money from the *Whittles*, if practicable, yet we do not think he was bound by that expression to follow the *Whittles* with strict legal diligence. There is no evidence to shew, that there has been any such engagement, or such negligence in enforcing it against the *Whittles* as should absolve the *Bells.* There are other items in *Thompson's* account, which we did not understand were objected to.

"Upon the whole, we award and determine, that neither the complainants, the original bill holders, nor the assignees of the *Bells*, nor those of *Marcus Heyland*, have any claim upon the funds received by *Thompson* from *Heyland.* And that a decree shall therefore be made dismissing their bill; but without costs. 12th February, 1827."

A decree was passed accordingly on the 26th February, 1827.

JONES *v.* MAGILL.

An injunction may be granted in any case, on the bill alone, before a subpœna has issued, on affidavit, or such other testimony as shews the truth of the statements of the bill; except to stay proceedings at law to recover mortgaged property. The mode of giving notice of a motion to dissolve. Exceptions to the answer, and the motion to dissolve, may stand for hearing at the same time. The rule further proceedings may be entered, during the sittings, and at the same time with the entry of notice of motion to dissolve, and may be enforced at the same time; or at the proper time after the motion to dissolve has been disposed of. On hearing the motion, the plaintiff opens and concludes the argument. In extraordinary cases, the injunction is granted upon terms adapted to the circumstances. It is a general rule, that where there are two or more defendants, no motion to dissolve can be heard until all of them have answered; but to this rule there are exceptions. Where one of the defendants has answered, he may have the plaintiff compelled to use all due diligence to enforce an answer from the other defendants, or to have the case placed in such a situation as to enable the responding defendant to move for a dissolution of the injunction.

This bill was filed on the 18th of January, 1825, by *Elizabeth Ann Jones*, executrix of *Abraham Jones*, deceased, against *Thomas Magill*, *John F. Gittings*, and *Thomas N. Harding*. The bill states, that on the 26th of October, 1818, the defendant *Harding*, gave his note for the sum of $500, to the defendant *Gittings*, which was signed by the late *Abraham Jones*, the testator of the plaintiff, as surety for *Harding;* that *Harding*, in order to save *Jones* harmless, on the 10th of August, 1822, by a bill of sale, conveyed to *Alexander Warfield* certain negroes and other personal property, a part of which was intended for the security of *Warfield*, who was bound for *Harding* in other cases; that after the death of the plaintiff's testator, *Warfield*, on the 5th of April, 1823, by bill of sale, conveyed to this plaintiff, two negroes, named *Nelson* and *Mason*, which were intended by *Harding* to secure the plaintiff against loss by the liability of her testator, on the note for $500; that, with a view to defraud the plaintiff, those negroes had been concealed and disposed of, out of this State, by the defendants *Harding* and *Magill;* that on the 11th of December, 1821, *Harding*, by bill of sale, conveyed two negroes, *John* and *Westley*, to the defendant *Gittings*, for the purpose of securing to him the payment of a note which he held of *Harding's*, for the sum of $326 81; that the money secured by those two notes belonged to *Juliet A. C. Gittings*, then an infant, who was married, in January, 1823, to the defendant *Magill;* that the defendant *Gittings*, who was her

guardian, after her marriage, assigned those notes, and with them the negroes conveyed to secure the payment of the note for $326 81, which were worth more than that amount, to *Magill;* that *Magill* and *Harding* agreed with the plaintiff, that those negroes should be applied to the payment of the note for $500, if they should be more than sufficient for the satisfaction of the note of $326 81; that the debt of $326 81, was afterwards settled between *Harding* and *Magill*, notwithstanding which, *Magill*, on the 17th of October, 1823, by a bill of sale, conveyed those two negroes, *John* and *Westley*, to *Lloyd Gittings*, in trust, for the use of the infant children of *Harding;* he, *Harding*, being then insolvent; and that *Magill* had brought suit, and obtained judgment against this plaintiff at law, on the note for $500, upon which he had sued out and levied an execution upon the property of this plaintiff. Upon which the bill prayed, that the proceedings at law might be stayed by injunction and for relief, &c. An injunction was granted accordingly.

On the 16th of May, 1825, the defendant *Magill* put in his answer, in which he says, that the defendant *Gittings*, as the guardian of his, *Magill's*, wife, passed a final account with the Orphans Court; and among others, assigned to her the two notes, as stated in the bill; that *Harding*, on the 28th of February, 1823, delivered to this defendant, the two negroes *John* and *Westley*, in full satisfaction of the note for $326 81, which sale and delivery was fair and *bona fide;* that he afterwards hired those negroes to *Harding;* that being moved by the poor and destitute situation of *Harding*, whose wife is the sister of the wife of this defendant, he, *Magill*, did convey those negroes in trust for the use of *Harding's* infant children, as stated in the bill; and he denies, that he ever agreed, that those negroes should be sold, and that the amount for which they sold over the sum of $326 81, should be applied towards the payment of the note for $500; that this defendant has been informed by the defendant *Gittings*, and this defendant believes, that the late *Abraham Jones*, the testator of the plaintiff, was not the mere surety of the defendant *Harding* in the note for $500; but that *Jones* was in fact the principal debtor, and that the money lent on that note was received by him and appropriated to his own use, although *Harding's* signature to it stood first in order; that in September, 1817, *Harding*, for money borrowed, gave his note to the Bank of Westminster for $1000, with *Abraham Jones*, *Alexander Warfield*, and *Richard Beall*, as his sureties; and, to save *Warfield* harmless,

made to him the bill of sale of the 10th of August, 1822, which was intended for that purpose only, and not to secure or benefit *Jones*, in any manner, on account of his liability to *Gittings* on the note for $500: this defendant admits, that *Warfield* did convey to the plaintiff two negroes by the bill of sale of the 5th of April, 1823; but he denies, that he had any knowledge of, or agency directly or indirectly in concealing, or removing those negroes from this State; that the testator of the plaintiff in his lifetime, and this plaintiff, since his death, have frequently promised to pay the note of $500 to this defendant; and finally, this defendant admits, that he has obtained judgment and levied execution, as stated in the bill, and prays that the injunction may be dissolved, &c.

The defendant *Harding* filed his answer on the 16th of May, 1825, in which he says, he admits, that he was indebted to *Magill* as stated; that, in consideration, and in full satisfaction of that debt, he conveyed to *Magill* the two negroes *John* and *Westley*, which negroes *Magill*, whose wife is the sister of this defendant's wife, conveyed in trust for the use of the children of this defendant, intending it as a gift to them from their aunt; that the whole transaction was *bona fide*, and without fraud: this defendant denies, that he ever agreed with the plaintiff, that the value of those negroes, if more than sufficient to satisfy the note for $326 81, should be applied to the satisfaction of the note for $500; that this defendant, at the instance and request of the late *Abraham Jones*, borrowed of the defendant *Gittings* the sum of $500, which he delivered over to *Jones* for his use; that they gave their note to *Gittings* for the amount so borrowed; and although this defendant's name stands first in order as being apparently the principal obligor; yet he is, in fact, no more than the mere surety of *Jones*, which fact is well known to the defendant *Gittings;* that this defendant borrowed from the *Bank of Westminster* the sum of $1000, for which he gave his note with *Abraham Jones*, *Alexander Warfield*, and *Richard Beall*, as his sureties; and at the instance of *Warfield*, and for the purpose of saving him and his other sureties harmless, after that note had been reduced by payments to $730, he conveyed to him by the bill of sale of the 10th of August, 1822, property to the value of $1250; and this defendant denies, that it was intended, in any manner, as a security for the payment of the note of $500: this defendant admits, that he has sold the negroes, *Nelson* and

Mason, and has appropriated the proceeds of sale to his own use; averring that he was well justified in doing so, &c.

These answers not having been filed during the sittings of a term, the Chancellor on application passed the following order as usual in such cases.

16*th May*, 1825.—BLAND, *Chancellor*.—In this case the defendants, *Thomas Magill*, and *Thomas N. Harding*, having filed their answers, and entered on the docket notice of a motion at the next term to dissolve the injunction issued in the said case, it is ordered, that the said motion stand for hearing at the next term, provided a copy of this order be served on the complainant or her solicitor before the twentieth day of June next.

A copy of this order having been served as required, and no counsel appearing for the plaintiff, the motion to dissolve the injunction was submitted on the part of the defendants, *Magill* and *Harding*.

11*th August*, 1825.—BLAND, *Chancellor*.—An injunction, if prayed for by the bill, may be granted in any case on the bill alone, before a *subpœna* has been issued, or the party summoned; except to stay proceedings at law in an action of ejectment by a lessor, under the act of 4 *Geo.* 2, *c.* 28, *s.* 3.; or to recover mortgaged property under the act of 7 *Geo.* 2, *c.* 20, in which cases no relief, or injunction can be granted before the defendant shall have been summoned and heard.(*a*) But in no case can an injunction be granted on the bill alone, unless it be verified by the affidavit of the plaintiff; or of one of the plaintiffs, where there are more than one; or, if the plaintiff be not a resident of the State, by the affidavit of some third person, who especially shews how he happens to have a knowledge of the facts set forth in the bill; or by some other testimony sufficient to induce the Chancellor to credit the bill for the truth of its statements.(*b*)

In ordinary cases the injunction is simply granted as prayed; and, in such cases, the defendant may, immediately upon filing his answer, give notice to the plaintiff of a motion to dissolve the injunction to be heard at the then next term. If the answer be filed

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(*a*) Todd *v.* Pratt, 1 H. & J 465; Eden. Inj. 85.—(*b*) Moore's Lessee *v.* Pearce, 2 H. & McH. 239; Schermehon *v.* L'Espenasse, 2 Dall. 360; 2 Harr. Pra. Cha. 221; 1 Cain. Ca. Err. 1.

during the sittings(*c*) of a term, this notice can only be given by an entry of it upon the docket, of which the plaintiff is bound to take notice; or, if not then entered, it can only be put upon the docket at the next sittings; and so on, from term to term. But, if the answer be filed after the close of the sittings of a term, then the defendant must make such an entry upon the docket, and also obtain a special order, such as that which has been passed in this case; and must produce proof of its having been served as required, before his motion can be heard.

The defendant may, during the sittings of a term, at the same time he enters upon the docket a notice of a motion to dissolve the injunction, if the case be so situated, that it lays with the plaintiff next to proceed, also have entered a rule further proceedings, by the next term; so as to compel the plaintiff to proceed with his case, in addition to his shewing cause upon the motion to dissolve. And if the plaintiff *excepts* to the sufficiency of the answer, such exceptions may be taken up and decided at the same time, and together with the motion to dissolve.(*d*) After the notice of a motion to dissolve has been given, in either of those modes, and the rule further proceedings has been entered, the defendant may, at any time, after the specified period has elapsed, which is the first four days of the then next term, take advantage of both, at the same time, during the sittings of any term, so as to have the injunction dissolved, and the bill dismissed at once; without giving any fresh notice, or laying a new rule.(*e*)

The motion is to dissolve, *unless cause shewn by the plaintiff;* and therefore on the hearing of it, the matter is opened by him, then the defendant is heard, and the argument is closed on the part of the plaintiff. If the plaintiff fails to appear and shew cause, the injunction may be dissolved on such default, without any consideration by the court, of the bill and answer; which will become absolute at the close of the sittings of the term unless cause shewn. But, if the Chancellor is called on, during the sittings, as he may be, for his judgment upon the motion to dissolve, and he orders the injunction to be dissolved, then it will not, on any account, be reinstated merely on the same bill and answer.

(*c*) See ante, 126, note (*o*).

(*d*) Alexander *v.* Alexander, MS., 13th Dec. 1817; Eden Inj. 73.—(*e*) 2 Mad. Chan. 385; Naylor *v.* Taylor, 16 Ves. 127; Bishton *v.* Birch, 2 Ves. & Bea. 40; James *v.* Biou, 3 Swan. 244; Farquharson *v.* Pitcher, 3 Russell, 383.

In extraordinary cases, however, the course of the court has always been varied to suit the emergency, or the peculiar circumstances.(e)

(e) Eden Inj., 235.

Bryson v. Petty.—The bill, filed on the 13th of May 1786, by Andrew Bryson against John Petty and Thomas Rutland, states, that the plaintiff was the master and commander of the ship Kitty, then lying in the harbour of Annapolis, of which the defendants were the owners; that the plaintiff had made several voyages in the ship, as master; and been under the necessity of making sundry disbursements, and incurring considerable expenses on account of repairs, &c. for the ship; that the defendants had refused to account with, or reimburse him the amount thereof; and had, by a writ of replevin, taken the ship, with her cargo of salt, from his possession; were about to send her out of the country, and to go themselves beyond the jurisdiction of this court. Prayer for general relief; for an injunction to prevent the removal of the ship and cargo; and for a *ne exeat* to prohibit the defendants from leaving the State. This bill was sworn to in the usual general manner. And there does not appear to be any other specification of the claim or amount due than by a general reference to the exhibits.

13*th May*, 1786.—Rogers, *Chancellor*.—Issue *subpœna*, *ne exeat*, and injunction as prayed, with liberty, nevertheless, for the said John Petty to proceed to the trial of his replevin at law, but to stay execution on any judgment he may obtain therein, until further order.

The defendant, Petty, by his petition, stated, that he had filed his answer, that the ship Kitty belonged to him and his partner in England, Joseph Yates; that the defendant Rutland had no interest in her; that the petitioner was anxious to send her to Europe, and had accordingly written to have insurance made on her voyage; that, while here idle, she was decaying, and would be soon destroyed by the worms; that he was willing to pay what might be found due the plaintiff, and prayed that the injunction might be dissolved on his giving bond, &c.

11*th June*, 1786.—Rogers, *Chancellor*.—Ordered, that an account be adjusted, made and taken by auditors of and upon the several transactions mentioned, and set forth in the bill, answer and exhibits filed in the said cause.

By consent, three persons were appointed as auditors, &c.

24*th July*, 1786.—Rogers, *Chancellor*.—Upon hearing the petition of John Petty, one of the defendants, in presence of the parties, by their counsel; it is *ordered*, that the injunction issued in this cause, so far as it relates to the ship Kitty, be dissolved upon the said John Petty giving bond, with good surety, to be lodged in and approved by this court, to abide by, observe and perform the final decree of this court; but that the injunction shall continue and remain in full force as to the salt in the said injunction mentioned.

On the 4th December, 1786, before me the subscriber, one of the justices of the peace for said county, personally appeared William Jessop Vickers and made oath, that on the thirtieth day of November last he, as clerk on a commission from chancery, wherein Andrew Bryson is complainant, and John Petty and Thomas Rutland are defendants, issued a summons signed Thomas Harwood and John Muir, commissioners appointed by the High Court of Chancery, to examine evidences on behalf of Andrew Bryson, complainant, and John Petty and Thomas Rutland, defendants. Which summons was directed to the sheriff of Calvert county to execute, and is in the words and figures following, to wit:

"*Maryland, sct.*—The State of Maryland, to William Richards, now of Calvert

Where the equity of the bill appears to be doubtful; or where the magnitude, and nature of the subject enjoined

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county, greeting:—You are hereby commanded, that all excuses set apart you personally be and appear before the commissioners appointed by the High Court of Chancery, at the city of Annapolis, on Saturday the second day of December next, to testify on behalf of Andrew Bryson complainant, and John Petty and Thomas Rutland defendants: hereof fail not as you will answer the contrary at your peril. Witness our hands this 30th day of November, 1786.—Thomas Harwood, John Muir, commissioners. To the sheriff of Calvert county."

Which said summons was duly served as appears by the return on the back thereof, to wit:—"Summoned. W. Allen, sheriff." This deponent saith, that although the said summons was duly served as aforesaid, the said William Richards neglected to appear according to the direction thereof, which prevented the said commissioners proceeding in the execution of said commission.

4th December, 1786.—ROGERS, *Chancellor*.—Issue attachment of contempt against the said William Richards, returnable next court.

No further proceedings being had under this order; the case was brought before the court for final hearing.

28th March, 1787.—ROGERS, *Chancellor*.—*Decreed*, that the defendant Petty pay to the plaintiff the sum of £647 14*s*. 9*d*., with interest from 7th April, 1786, until paid, and costs; and further, that the defendant Petty give bond, to be approved by the Chancellor, to indemnify the plaintiff for any claims that may be made against him on account of the ship Kitty; and that the injunction so far as respects the prosecution of the replevin remain in full force, &c.

The defendant John Petty, having been served with a copy of the decree; the plaintiff, by his petition, stated, that the defendant Petty had appealed, but had not given bond; that he had not paid the sum of money decreed; that he had not given the bond of indemnification decreed; and that he had disposed of the salt, on which the plaintiff had a lien, in violation of the injunction. Prayer for a *ca. sa.* against Petty for the sum decreed; and for attachments for not giving the bond of indemnification, and for a breach of the injunction.

2d May, 1787.—ROGERS, *Chancellor*.—Ordered, that *ca. sa.* and attachment to compel indemnification according to decree issue according to the prayer of the plaintiff's petition.

Afterwards the plaintiff called on the sheriff to bring in the defendant under the *ca. sa.*, and the defendant moved to set it aside.

21th May, 1787.—ROGERS, *Chancellor*.—The *ca. sa.*, in this case, issued with propriety, and the plaintiff ought to be at liberty to call it; and the defendant John Petty being brought into court, he is thereupon, on the prayer of the plaintiff, committed in execution of the decree aforesaid to the sheriff of Ann Arundel county.

Who being present took charge of him accordingly, and committed him to close custody in a chamber of the house of George Mann, (the tavern,) the same being used as a gaol.

McMECHEN *v.* STORY.—This bill was filed on the 23d of December, 1806, by David McMechen against Thomas Yates, Alexander Story, and The Mayor and City Council of Baltimore, to obtain an injunction to stay proceedings at law in a suit which had been instituted in the name of The Mayor and City Council of Baltimore,

is such as to require a hearing without delay; it being of a public concern, or an extensive work in which a num-

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for the use of Alexander Story. It is stated in the bill, that the plaintiff in January, 1799, became bound by a joint and several bond to the city of Baltimore as surety of the defendant Yates as an auctioneer; that afterwards separate suits were brought on the bond against Yates, and the plaintiff, in the name of the city, for the use of Story; that Yates repeatedly assured the plaintiff, that the cause of action should be settled and adjusted, and that he, Yates, would cause those suits to be defended, and had employed a lawyer for that purpose; that the attorney, instead of making any defence, by the fraudulent contrivance and misrepresentation of Yates, withdrew the plea of general performance of all the stipulations in the condition of the bond; and in May, 1803, confessed judgment for the sum of $4154 30, with interest from the first of January, 1800, and a stay of execution until the first of August, 1803; which judgment was afterwards affirmed by the Court of Appeals; that the claim of Story against Yates, upon which those suits were brought on the bond, was for goods sold by Yates as auctioneer, for Story, the price of which he had not paid over; which, not being a claim covered by the terms of the bond, according to a fair construction of the city ordinance, in conformity with which it was given, this plaintiff cannot be held liable for it; because that ordinance requires a bond from auctioneers to secure the payment of the auction duties made payable to the city, and nothing more. The bill having been filed and submitted,

23*d December*, 1806.—KILTY, *Chancellor*.—It is ordered, that *subpœna* and injunction be issued as prayed. But the Chancellor considers it a doubtful case; and therefore will, during the first four days of February term next, or of any term thereafter, hear a motion for its dissolution. And the register is directed to endorse a copy of this order on the injunction.

On the 27th January, 1807, the plaintiff, by his petition on oath, stated that as he had been advised his bill did not contain all the necessary parties; that he could not have the relief he was entitled to, under the general prayer of the bill, without some additional special interrogatories; that William McMechen, the attorney who appeared for the defendants in the suits on the bond, was a necessary party; and that the defendant Story was a citizen, resident of the State of New York, against whom, as such, he wished to obtain an order of publication. Wherefore he prayed leave to amend his bill.

28*th January*, 1807.—KILTY, *Chancellor*.—The Chancellor will determine on this petition during the first week of the ensuing February term, which he considers will be in time to do justice to the parties.

The plaintiff, by his petition filed on the 4th of February, 1807, renewed his application for leave to amend his bill.

5*th February*, 1807.—KILTY, *Chancellor*.—The Chancellor is still of opinion, that a determination on the petition for amending the bill need not be made before the ensuing term. But as it is pressed by the complainant, leave is given to amend the bill as prayed; with the express proviso, that this leave shall not alter, or do away the order of the 23d December last, that the Chancellor would, during the first four days of February term next, or of any term thereafter, hear a motion for its dissolution.

On the 16th of February, 1807, the plaintiff filed his amended bill, in which he states the fact of the nonresidence of the defendant Story; makes William McMechen a party; and propounds to the defendants a number of interrogatories, which he

ber of people are daily employed, as a ferry, a turnpike road, a canal, a street, a furnace, a joint stock cotton factory,

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conceived to be important and necessary to help out the case he had set forth in his original bill.

After which, on the 23d of February, 1807, the defendants Yates and The Mayor and City Council put in their answers separately. Yates admits, that the judgments were rendered against him and the plaintiff as stated. But he denies all fraud and misrepresentation as charged in the bill; and introduces sundry matters in avoidance of the equity on which the plaintiff founded his claim to relief. On the 24th of the same month the defendant McMechen answered, and stated his knowledge of the manner in which the judgments had been obtained. And on the 14th of March, 1807, the defendant Story filed his answer; which it appears was sworn to before a notary public of the State of New York, and certified under his signature and notarial seal.

21*st March*, 1807.—Kilty, *Chancellor*.—This motion came on to be argued on a motion to dissolve the injunction, principally on behalf of Alexander Story, one of the defendants interested in, and claiming for himself or his assignee, Thomas C. Jenkins, the money appearing due by the judgment enjoined; and has been delayed for further notes and authorities for the complainant.

Under the order of the 23d of December the defendants were entitled to make this motion without answering, or giving notice. But whether they cannot also have the benefit of the answers filed, is a question, which it will be important, as to the practice, to determine. It was strongly contended by the complainant's counsel, that at this time no answer could be considered; and that the case rested on the propriety of granting the injunction on the equity appearing in the bill.

The Chancellor has seen several cases, in the time of his predecessor, of injunctions granted on similar terms; and he has found it expedient to follow those precedents, in cases which appeared doubtful; and especially in those in which, from the application having been delayed till the last moment, a further delay, for the purpose of full consideration, would amount to a refusal; as it would have done in the present case. But it may be doubtful, whether, in such cases, a refusal to grant the injunction would not be the most proper course.

When the bill was presented to the Chancellor, his doubts arose as to the effect of the manner of giving the judgment; and of the bond under the ordinance of The Mayor and City Council. For there was not a sufficient charge of fraud, by Story, to justify an injunction against him; and he could not be justly made answerable for the fraud of Yates, as alleged in the bill. But supposing it possible that the law might be as stated in the bill, the Chancellor ordered the injunction to be issued, with the proviso before mentioned.

A defendant who is enjoined from pursuing his legal remedy, by the oath of the complainant to the matter stated in his bill, has a right to appear immediately, without waiting for a *subpœna*, and to put in his answer; which, if it denies the equity, is generally sufficient to procure a dissolution. And if it comes in, so as to afford a reasonable time, an order is granted, during the vacation, for hearing a motion at the first term thereafter, on notice being given. And where, as in this case, notice is previously given, there is no rule, or principle which can render the consideration of an answer improper. Supposing the hearing to be only for the purpose of deciding, whether the injunction ought to have been granted, ought the court to disregard an answer which goes to shew, that the complainant was not in fact entitled to what he claimed? or should the injunction be continued in opposition to such an answer, for the purpose of taking it up at the succeeding term? The Chancellor recollects

&c.;(*f*) or where there are many defendants who are widely dispersed, or some of whom are nonresidents, and it appears, from

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some cases in which answers have been thus put in, and have been considered, without any objection having been made. And he is clearly of opinion, that the answers, as far as they are affected by this objection, form a part of the case now for its determination.

When the bill was presented to the Chancellor, he was not informed of the opinion which had been given by the Court of Appeals. A short copy only of the judgment of that court was filed, stating the affirmance, without any notice of an opinion having been given. (2 *H. & J.* 41.) The answer of Story has been filed since the argument; but is not considered as making any difference in the decision.

It is, on the whole, *Ordered*, that the injunction in this case shall be, after the 30th day of the present month, dissolved without further application or order. Provided, that if the complainant shall, on or before that day, pay the amount due on the said judgment, and the legal costs to the said Alexander Story, or his assigns, or his counsel in this suit; or pay the same into this court, for the purpose of being immediately so paid, an order for another injunction will be issued, if applied for.

On the 5th of October, 1807, the bill was dismissed by order of the plaintiff. After which, Thomas C. Jenkins, by his petition stated, that he had paid the sum of $12 99 for postage, notarial seals, &c. in obtaining the answer of the defendant Story, which he prayed to have allowed to him; and, that the register be directed to tax that amount with the costs of the defendant.

10*th March*, 1808.—Kilty, *Chancellor*.—The Chancellor is not satisfied, that this charge is properly taxable in the costs; and the present state of the accounts is a further objection. Supposing the petition to be intended for an order to have those sums taxed in or added to the costs, it cannot be granted.

(*f*) Crowder *v.* Tinkler, 19 Ves. 622; Winstanley *v.* Lee, 2 Swan. 335.

Worthington *v.* Bicknell.—The General Assembly, by the act of 1803, ch. 89, appointed Thomas Bicknell, with six others, commissioners to open a road, from a point on the road leading from the city of Annapolis, round the head of South river, by Waters' mill, and the South river Meetinghouse, to Ashton's ford, on the Patuxent, thence through Ogle's plantation to intersect the road leading to Bladensburg; provided, that they should not run it through the buildings, yards, orchards, gardens, or meadows of any one without his consent. Under the authority of this law, the commissioners surveyed the road, along the route thus described, so as to pass near the mill of John Worthington; upon which he filed a bill in this court, on the 11th of December, 1805, in which he alleges, that the commissioners had exceeded the authority conferred on them by this law, in locating the road in such a manner as most wrongfully, and ruinously to affect his mill, by so crossing and passing along the mill race, as to obstruct or prevent the water from flowing to it. And thereupon prayed an injunction to prevent the commissioners from opening the road, as thus located by them. Which injunction was granted as prayed. The commissioners answered the bill, and denied the allegations and opinions as therein set forth by the plaintiff. And the case was afterwards brought regularly before the court on a motion to dissolve the injunction.

22*d December*, 1806.—Kilty, *Chancellor*.—The motion to dissolve the injunction in this case having been continued from the September term last, was submitted at this term on notes in writing, which, together with the proceedings, have been attentively considered.

the statement in the bill, that the facts rest altogether within the knowledge of one or two of them, the Chancellor always, in granting the injunction, specifies the time and terms upon which a motion for a dissolution may be heard. It is declared, that the motion may be heard without answer, or immediately at the same term, or during the sittings of the next term after the filing of the answer, without notice; or at any time, on giving so many days notice, after filing the answer; or on the answer of one or more of the defendants before the others have

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The question arising in this case is an important one as it respects the interests of the parties, and the power and jurisdiction of this court. The position laid down by the late Chancellor, and which appears to be conformable to the principles of a court of equity, was, that this court ought not to control the judgment of commissioners, in cases similar to the present; who, when they exercise their judgment on a subject, over which the law has invested them with power; and determine on an act to which that power is competent, cannot with propriety be restrained.

The question occurs then, whether, in this case, the law has invested the commissioners with a power on the subject over which they have exercised their judgment? The act empowers them to survey, lay out, and open a road in the best and straightest direction; and leaves the manner of executing it to their discretion, without requiring a confirmation of their proceedings by the Levy Court, or any other tribunal. It was for the legislature to determine, whether such power should be given, and they have made no exception; but that of the buildings, yards, orchards, or meadows, through which they are prohibited from running, without the owner's consent. But it is alleged, that the commissioners, acting under a special authority, have exceeded the powers vested in them, by locating the road over the mill race, which is as much a building, or part of a building, as the mill house. If the Chancellor could entertain this opinion, the injunction would certainly be made perpetual; but a mill race is, in no sense, a building, or a part of a building. (*Co. Litt.* 161, *a.*)

One of the grounds for the injunction, stated in the bill, is, that a road equally good with that contemplated by the commissioners, and as little expensive, may be had by running it through the complainant's land above the race and dam. But, this opinion is expressly contradicted by the commissioners. Surely this is a point on which the law has invested them with a power to decide according to their judgment; and the propriety of that judgment ought not to be questioned by this court. So that this averment, by the complainant, cannot have any weight; nor is it necessary to consider the depositions respecting it, even if, from the contrariety of that sort of testimony, furnished by the respective parties, any satisfactory opinion could be formed.

The observations of the complainant, respecting the valuation made by the commissioners, are answered by referring to the provision made by the act for an inquisition by a jury to which he might have resorted.

Before a great public work should be impeded, by the continuance of an injunction, it ought to appear clearly and satisfactorily, that the defendants were about to act contrary to the law which gave them the power, or to do acts not sanctioned by it; or in some other way to injure the complainant, so as to come within the established principles, as a ground for their being restrained by this court.

Such a case has not been made out by this complainant, and it is therefore ordered that the injunction be dissolved.

answered.(g) And for the purpose of apprising the defendant of those special terms, upon which the injunction has been granted,

(g) JENIFER v. STONE.—This bill was filed on the 29th of June, 1809, by Daniel of Saint Thomas Jenifer, administrator of Daniel Jenifer, deceased, against Travers Daniel, John M. Daniel, and Michael J. Stone, surviving executor of Thomas Stone.

The bill states, that the defendant Michael, the surviving executor, had, on the 23d of October, 1806, obtained a decree in this court against the intestate of this plaintiff, for the sum of £1119 3*s.* 7*d.*; that the defendant Michael's testator left two daughters, his only children and heirs; one of whom, Mildred, married the defendant Travers Daniel, and the other, Margaret, married the defendant John M. Daniel; that these defendants, Travers and John, after their marriages, on the 13th of January, 1798, entered into a covenant with the executors of the late Thomas Stone, of whom the defendant Michael is the survivor, by which they, as executors, were to be saved harmless from the demands of the creditors, and discharged from all liability to the representatives of their testator; and they, Travers and John, were to use the names of the executors, for the purpose of collecting and recovering all sums due to their testator; that this plaintiff's intestate was warned not to pay the amount of the decree against him to this defendant Michael; in consequence of which, and being assured, and believing, that the whole amount was properly payable to these defendants, Travers and John, he paid in part satisfaction of the decree, the sum of three hundred pounds to the defendant Travers; that this plaintiff has discovered, from the books of account of his intestate, that there is a large sum due from the defendant Michael to him; that the defendant Michael had caused a *fieri facias* to be levied on the estate of this plaintiff's intestate, without giving credit for the amount of the book account; and had only agreed, that the payment of three hundred pounds should be suspended until he should know the result of a suit instituted, in this court, against him by Alexander Scott, for the recovery of a debt alleged to be due from his testator; and if that debt was recovered, that then he, Michael, would cause the whole amount, including the three hundred pounds, to be levied under the *fieri facias*; and it was in conclusion stated, that the defendants, Travers and John, then resided in the State of Virginia. Whereupon the plaintiff prayed for an injunction to stay the proceedings upon the execution, and for general relief. The bill was sworn to by the plaintiff.

29*th June*, 1809.—KILTY, *Chancellor*.—The Chancellor, after some hesitation and doubt on the subject, has determined to order the injunction as prayed. There would have been less room for doubt, if the former complainant, M. J. Stone, had insisted on levying, at this time, the whole sum, without allowing for the £300 paid to T. Daniel; but, inasmuch as the bill alleges, that although that sum is, for the present, suspended, the said M. J. Stone declares, that he will hereafter levy it, if necessary; and it is a rule of this court not to suffer a creditor to proceed to the recovery even of what is due, when he demands also what is not due; the injunction is ordered on that part of the bill.

The Chancellor does not consider the debt stated to be due from M. J. Stone to Daniel Jenifer, to be sufficiently established from the appearance of the books; nor is he satisfied, that it is proper to be discounted in this case.

On account of the distant residence of the defendants, T. and J. M. Daniel, a motion to dissolve the injunction will be heard without their answer.

After which the plaintiff, by his petition, prayed for leave so to amend his bill as to aver, that his intestate had paid to this defendant, Travers Daniel, through his solicitor, in further part satisfaction of the decree, the sum of $120, the vouchers of which payment this plaintiff had discovered since the filing of his bill.

the register is directed to endorse, or send a copy of the order to be served along with the writ of injunction.(*h*)

The defendant, by his answer, admitted the payment of the £300, as alleged, and that the decree had been to that amount satisfied; he also admitted, that the covenant had been entered into with the defendants, Travers and John, as stated; but averred, that he had not been saved harmless, as stipulated; that he had been compelled to pay large sums of money, and was still liable for other claims as executor; to meet all which he had a right to collect and retain the balance due on the decree. In regard to the allegations of the petition to amend, this defendant, by a separate answer thereto, and agreement, admitted the payment as alleged. After which, the usual order *nisi* was passed, requiring notice to be given to the plaintiff to shew cause why the injunction should not be dissolved.

On the 22d of July, 1810, an answer was put in for the defendants, Travers and John, apparently in the handwriting of the plaintiff's solicitor; who, by a note in writing, agreed to receive it as such without oath. By this answer these defendants admitted most of the statements in the bill; they averred, that they had offered and were ready to indemnify the defendant Michael, according to their covenant, the copy of which, as exhibited by the plaintiff, they admitted to be correct; they stated, that they had filed their bill in this court against the defendant Michael, to compel him to account; that he is in very great pecuniary difficulties; and if he is permitted to collect the balance due on the decree, they will be wholly unable to recover it from him.

27*th July*, 1810.—Kilty, *Chancellor*.—The motion to dissolve the injunction in this case was argued at the present term. The equity, or cause of complaint, was removed by the answer of M. J. Stone, releasing the £300 paid to T. Daniel. The petition to amend, which was since filed, respecting the sums paid to counsel, amounting to 120 dollars, is also answered by the agreement of M. J. Stone, to relinquish his claim to that amount. So that there would be no grounds for continuing the injunction, as between these parties only. But the question is, as to the effect of dissolving the injunction between M. J. Stone, the executor of T. Stone, and T. and J. M. Daniel, as his representatives. And on the circumstances of this case, the Chancellor is of opinion, that the interests of the latter ought to be attended to so far as to prevent the receipt by M. J. Stone of the money due from Jenifer at present. It may be objected to the bill of T. and J. M. Daniel, filed the 2d of July, 1810, that it is not on oath; but it is accompanied by a very important paper, viz. the covenant or agreement between them and the executors of T. Stone, which would probably have been sufficient to have had the suit against Jenifer entered for the use of the former.

Considering M. J. Stone as an executor; and, therefore, acting as a trustee, he cannot be injured by the money due from Jenifer being retained until a final settlement can be made; and as to his claims, for payments made, they are not set forth with sufficient certainty in his answer. An order may hereafter be made for having the money levied, and brought into court; but, at present, it is *Ordered*, that the injunction be continued till further order; with liberty, however, for the complainant, Jenifer, to bring into this court the sum due, after deducting the discounts claimed, and allowed, as appears by the proceedings. The answer of T. and J. M. Daniel to the bill of D. of St. Tho. Jenifer, has not been considered in making the above decision; and the manner in which it is put in is liable to some exceptions.

After some other unimportant proceedings, the case seems to have abated by the death of the parties.

(*h*) Diffenderffer *v.* Hillen.—This suit was instituted on the 10th of December, 1808, by John Diffenderffer, Charles Tinges, and George Smith, against John

It is an ancient and well settled general rule, that where there are several defendants to the bill, no motion to dissolve the injunc-

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Hillen and John Marsh. The bill states, that before Baltimore was incorporated as a city, the then commissioners of the town had so graded Baltimore street continued and York street, from Jones' falls to Harford street, as that the water, falling into them, was conveyed in nearly equal proportions in the opposite directions to Jones' falls and Harford run; according to which graduation they had regulated their improvements; that by the act of 1796, ch. 68, s. 9, the grade of no street can be altered without the consent of the proprietors of the lots adjoining such street; that without the consent of these plaintiffs, and contrary to law, the defendants, as city commissioners, had altered the grade of Baltimore and York streets, whereby there is, and will be a very considerable increase of water and filth conveyed to Jones' falls before their property, and that of others in like situation; which, especially in the summer season, is matter of no small moment; and, that the defendants are now actively engaged in cutting down and adjusting those streets to the new graduation. Upon which the plaintiffs prayed for general relief, and for an injunction to prevent the alteration of the grade of those streets.

10*th December*, 1808.—KILTY, *Chancellor*.—From a perusal of this bill, and an examination of the act of Assembly referred to, the Chancellor is at present of opinion, that there is ground for the complaint made; and that the injunction ought to be granted. Whether the act of 1797, ch. 54, makes any alteration of the provisions in the 9th section of the act of 1796, ch. 68, he is not prepared to say. But to prevent the injury which might arise by the interference of this court, in case the commissioners should appear to be acting within their authority, it is to be understood, that a motion to dissolve the injunction will be heard at any time, on such notice as shall be directed, either before, or after answer. The injunction to be issued as prayed, and this order copied thereon.

On the 12th of December, 1808, the defendant Hillen alone put in his answer, in which he stated, that the alteration in the grade of the streets, as stated in the bill, had been made with the consent of the proprietors of the immediately adjacent lots; that the plaintiffs owned no lots nearer than from six to nine hundred feet from those streets; and that these defendants then had employed nearly twenty labourers, with carts, making the alterations in those streets; which, when made, would be highly beneficial to the public in general. Upon which this defendant moved to have a day appointed to hear a motion to dissolve.

12*th December*, 1808.—KILTY, *Chancellor*.—Ordered, that a motion for dissolving the injunction be heard on the 20th instant; provided a copy of this order be served on either of the complainants, or their solicitor, on or before the 18th instant.

The plaintiffs' solicitor admitted the service of a copy of this order, and the motion came on to be heard.

20*th December*, 1808.—KILTY, *Chancellor*.—The motion for the dissolution of the injunction issued on the 10th instant was, according to appointment, argued on this day.

Although the presumption is, and ought to be, that persons acting under the charter and ordinances of a corporation, will conform to the limitations therein contained; yet when a case is stated, on oath, which apparently shews a contrary proceeding, it becomes the duty of this court to interfere. The answer of the defendant, denying the grounds of the application, is, however, entitled to equal attention. The Chancellor was under the impression, from the bill, that some of the parties held property

tion can be heard until all of them have answered.(*i*) But to this, as to all other general rules, there are exceptions. As where the

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immediately, or very nearly fronting on the part of the street in which the work was to be done. And he was not, nor is he now satisfied, that the consent of every person, holding property fronting on Baltimore street and York street, was necessary to be obtained. And, from the exhibits filed with the answer, there is reason at least to doubt whether the commissioners have acted wrong; if not to believe, that they have acted right.

It is thereupon adjudged and ordered, that the injunction heretofore issued in this case be and the same is hereby dissolved; leaving the parties to proceed in equity or at law as they may think proper.

After which, on the 7th of July, 1809, this suit was dismissed, with costs, by the complainants' solicitor. Whereupon the defendants obtained a bill of their costs from the register, and moved, that the plaintiffs might be ordered to pay the amount.

11*th March*, 1811.—KILTY, *Chancellor*.—On motion, on behalf of the defendants, it is *Ordered*, that the complainants, John Diffenderffer, Charles Tinges, and George Smith, pay to the defendants, or either of them, or to their solicitor, or their or his order, the sum of twenty dollars fifty seven and one-half cents; being the amount of the costs taxed by the register on the dismissal of the bill of the said complainants; or that they shew cause to the contrary on or before the 10th day of April next. Provided a copy of this order be served on the said complainants, or either of them, or left at the place of abode of any one of them, before the first day of April next.

(*i*) Pra. Reg. 200; 2 Harr. Pra. Chan. 263; 3 Bac. Abr. 658; Eden Inj. 66; Wright *v.* Nutt, 2 Dick. 691.

STEWART *v.* BARRY.—This bill was filed on the 31st of August, 1809, by James Stewart, William Lorman, and William Gwynn, as executors of the late William Evans, against Robert Barry, John Stewart, David McMechen, and Thomas Yates—in which it is stated, that the defendants Barry and Stewart were the assignees of the defendant Yates, a bankrupt; that as assignees they set up for sale, at public auction, a piece of land called Springfield, the title to which was represented as clear and unquestionable, and the late William Evans became the purchaser, for the sum of $29,169 82; that all these transactions took place with the knowledge and concurrence of the defendant McMechen, who held a mortgage on the land, at the time, to secure a large debt due to him; that the late William Evans was put into possession of the land; and, under an impression that the title of the vendors was good, he had paid a part of the purchase money; that it has been since ascertained, that the title is much encumbered and entirely defective; and that since the death of Evans, the assignees of the bankrupt had instituted suit, and recovered judgment against these plaintiffs for the balance of the purchase money. Whereupon the plaintiffs prayed, that the sale might be vacated, &c.; and, that they might have an injunction to stay the proceedings at law against them.

It appears, that at the time when this bill was filed, the Chancellor was absent; and, according to the long established course, under such circumstances, it was submitted to a solicitor of the court, who was in no way concerned in the case; who declared, and endorsed it on the bill as his opinion, that it contained sufficient equity to authorize the issuing of an injunction. Upon which sanction the register issued the injunction as prayed, subject to the opinion of the Chancellor, on his return to the seat of the court. And on the 7th of September, 1809, the solicitor's order for the injunction was confirmed by the Chancellor himself.

On the 5th of December, 1809, the defendant McMechen put in his answer, in

trustee and *cestui que trust* were both made defendants, and the trustee would not answer, a motion to dissolve was permitted to be

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which he admits the sale as stated; but denies, in general terms, the alleged defects in the title; and then sets forth various particulars, not responsive to the bill, going to shew, as he avers, that the vendors had a good and valid title; that he alone, from the peculiar nature of the case, was interested in having the injunction speedily dissolved, &c. Upon the filing of his answer, and before the other defendants had answered, he entered upon the docket and gave notice of a motion to dissolve the injunction.

On the 20th of February, 1810, the other defendants put in their answers separately, in which they admit, that the sale was made as stated by the plaintiffs; but deny that there was any misrepresentation, or defect of title. After which, the motion to dissolve the injunction was brought on to be heard, on the notice which had been given immediately after filing the answer of the defendant McMechen.

7th March, 1810.—Kilty, *Chancellor*.—Before the expiration of the time limited by the order, passed on the first or second day of the term for the dissolution of the injunction *nisi*, the counsel for the complainants shewed cause to the contrary, which was noted on the docket. It was objected, on their part, that the notice of motion to dissolve was entered on the answer of the defendant McMechen only; and, that the answers of the other defendants were afterwards put in without a repetition of the notice. The Chancellor considers, that, according to the rules and practice of the court, the defendants are not entitled to a hearing of their motion at this term. It is thereupon continued till the next term, to be then heard; but it will be in the power of the defendants, if they think proper, to give notice also of the motion to be then made.

The defendants then gave notice of a motion to dissolve the injunction at the next term, when it was regularly brought before the court.

9th July, 1810.—Kilty, *Chancellor*.—The motion for dissolving the injunction in this case, came on to be argued according to the notice given, since which the bill, answer, and exhibits, have been considered.

The ground of the complainants' bill was, that a good title could not be made to the land purchased by the testator, William Evans, from Barry and Stewart, the assignees of Yates. It is alleged therein, that at the time of the said sale, and before, it was publicly stated by Yates, the acting auctioneer, that the title was unquestionable. This fact is not expressly denied, either by the answer of Yates, who is made a defendant, or of McMechen, who is principally interested in the suit; although they allege, that the right of the assignee, and of the mortgagee, was all that was sold. But the equity of the complainants does not rest on that fact alone; as the question of the title is proper to be considered without any such express statement or assurance respecting it. Although it was contended in the argument, that the right only being sold, the purchaser was bound to take it at his risk. This position cannot be admitted, except in cases where the title was expressly stated, or known to be doubtful, and a reduced price was given accordingly.

It does not appear, from the several answers, that there is such a clear title to the land as those who claim under the purchaser ought to have before the money is paid. The legal title set up being only as to a part, and the equitable one being somewhat uncertain. The defendant McMechen states, that he believes Yates had a good and valid title to the land called Springfield, and that he bought the greater part from the Baltimore Company, the deeds for which are regularly acknowledged and recorded; and the equitable title to a part derived from James McFadon is also set forth. The defendant Yates refers, likewise, to the Baltimore records. But it cannot be expected,

made on the answer of the *cestui que trust* alone; and indeed where there appeared to have been fraud and collusion, the *cestui que trust*, although not a party to the suit, was allowed to move for a dissolution of the injunction;(*j*) and the injunction may be dissolved as against some of the defendants only; or it may be dissolved on the answer of an insolvent, who has no interest in the matter, upon his speaking to facts peculiarly within his own knowledge before his insolvency;(*k*) and so where it appears from the nature of the case, that the responding defendant is the only one who can speak, from his own knowledge, in relation to the facts on which the injunction rests;(*l*) as where the defendants who have not answered are infants; and so too where it appears, that the answer of a nonresident defendant cannot be material as to the facts on which the injunction is founded.(*m*)

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that the injunction of this court should be dissolved upon the strength of titles thus set out, and not answering the interrogatories in the bill.

The conduct and expression of Evans, in his lifetime, are relied on to prove his assent to the purchase, after the doubts as to the title were known. But the answer of the assignees shews only, that, although he was advised to the contrary, he was determined to abide by the contract, by paying for that part to which a good title could be given; and that he wished to receive a good title for the whole. And the directions in his will do not prove his consent to take the whole as it stood. Considering that the equity, on which the injunction was granted, still subsists, to wit, the uncertainty of obtaining a valid title after the payment of the purchase money; and its application to the claim against the land.

It is ordered that the said injunction be continued till the final hearing, or further order.

Without any further proceedings being had in this case, it appears to have been some time afterwards dismissed by the plaintiffs.

(*j*) Nugent *v.* Smyth, Mosely, 354.

(*k*) Joseph *v.* Doubleday, 1 Ves. & Bea. 497.

(*l*) Boheme *v.* Porter, Barn. Chan. Rep. 352; Rowcroft *v.* Donaldson, 1 Fow. Ex. Pra. 286.

(*m*) Sholbred *v.* Macmaster, 2 Anstr. 366.

Williams *v.* Hall.—It appears, that a bill had been filed previous to the institution of this suit, by James Williams and Solomon Hillen, against Edward Hall, David Stewart, and David C. Stewart, to obtain an injunction, which having been filed and submitted to the Chancellor, he granted the injunction, but suggested, that the bill seemed to be too indistinct and merely argumentative in regard to the plaintiffs not being interested as partners with the Stewarts. In consequence of which the plaintiffs afterwards, by their petition, stating, that no process had been issued, or served, prayed leave to withdraw their bill and exhibits from the files of the court. Upon which, on the 6th of July, 1809, the leave was granted as prayed.

This bill was filed on the 15th of July, 1809, by the same plaintiffs, against the same defendants. From which it appears, that the plaintiffs were partners in trade, which they conducted by Williams then residing in the West Indies, and Hillen in Baltimore; that Hall also then resided in the West Indies, carrying on trade there as

In the case under consideration the equity arises out of the facts as alleged in the bill, that *Harding* and *Magill* have not only

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a merchant; and that the Stewarts were residents of Baltimore, and partners in trade under the firm of David Stewart & Son; that this firm of David Stewart & Son had sent the schooner Holstein with a cargo on a voyage to the West Indies, consigned to Hall, who had sold that outward cargo; and, by various dealings in relation to that vessel, had made sundry advances, by which those who owned her, and were jointly concerned in her, had become indebted to him in a very considerable sum; that the defendant Hall had instituted a suit against these plaintiffs, with David Stewart & Son, as the joint owners of that vessel, and recovered judgment against them for the sum of $13,448 53 and costs; which judgment had been affirmed by the Court of Appeals; and on execution being issued thereon the plaintiffs had superseded the judgment, and given bond with surety according to law; that the defendants David Stewart & Son had become bankrupts, in consequence of which the whole liability and weight of the judgment had fallen upon these plaintiffs; that the plaintiffs were in truth not partners of David Stewart & Son, or in any way interested with them in the schooner Holstein; which fact, although well known to these defendants, these plaintiffs had been unable to shew and establish on the trial at law. And for the purpose of more perfectly illustrating and explaining the whole transaction, they prayed that the defendants might be ordered to produce their books of accounts, &c. Wherefore they prayed for an injunction to stay the proceedings at law, for general relief, &c. The plaintiffs, with their bill, offered an injunction bond with surety in the usual form, reciting, in the condition, the judgment of the Court of Appeals, but taking no notice of the supersedeas.

15*th July*, 1819.—Kilty, *Chancellor*.—Let *subpœna* and injunction issue in the usual form according to the prayer in the original bill. On further consideration of the bill on which the injunction was ordered as above, the Chancellor thinks it proper to state, that he will hear a motion for dissolving, if made according to the practice of the court in other respects, without waiting for the answer of Stewart & Son, who may not be interested in the event of the suit, and whom the other defendant cannot compel to answer.

On the 15th of February, 1810, the defendant Hall filed his answer, in which the facts and circumstances set forth in the bill are fully answered, explained away, or denied; and upon the filing of it, he caused to be entered on the docket a motion to dissolve the injunction; and on the same day, obtained the usual order authorizing notice to be given to shew cause. But soon after obtaining this order, on discovering that the injunction bond was, as he conceived, defective, he moved for an immediate dissolution of the injunction on the ground of its having been improvidently granted.

28*th February*, 1810.—Kilty, *Chancellor*.—In this case, which stands on notice of a motion to dissolve the injunction, it was urged by the counsel for the defendant, that independent of the main question, the injunction ought to be immediately dissolved on account of the bond not covering the judgment by supersedeas, which stands injoined with the first judgment. The practice has been, in case of any defect, or deficiency in the bond, to require further security and not to dissolve the injunction for that cause.

It is therefore, ordered, that unless an injunction bond, as required by law, to secure the payment of the judgment confessed as a supersedeas mentioned in the bill, and in the injunction, be filed in the chancery office with sufficient sureties on or before the 12th day of March next; the said injunction as far as it relates to the

fraudulently concealed and disposed of property which ought to have been applied in satisfaction of the debt with which the

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supersedeas, will, on application after that day be dissolved. Provided a copy of this order be served on the complainant Williams, or his counsel, or either of the superseders on the judgment so confessed, before the 7th day of March next.

In compliance with this order the plaintiffs filed another bond, in the condition of which the judgment confessed as a supersedeas was expressly recited in the usual form, which bond they submitted for approbation.

10*th March*, 1810.—KILTY, *Chancellor*.—The within bond is received for the present. If any objection should be made thereto, and ruled good, a further time will be fixed for the execution of another bond.

On the 7th of July, 1810, the defendant, David Stewart, put in his separate answer, by which he explained away or denied most of the principal facts and circumstances stated in the bill. And on the 6th of August, 1810, David C. Stewart filed his answer, in which he refers to, adopts, and relies upon the answer of his partner and co-defendant, David Stewart.

12*th September*, 1810.—KILTY, *Chancellor*.—The motion to dissolve the injunction in this case came on to be heard according to notice at the present term, and was fully argued by the counsel on each side.

In this case, as in others of a similar nature, whatever might be the result on the final hearing, it would be proper to continue the injunction if the answer was evasive and not full; if the answer did not deny the facts on which the equity of the complainants rested; and also if the books and papers, exhibited in compliance with the prayer of the bill, shewed, that the facts were different from what the defendant conceived and represented them to be. But the answer of the defendant Hall certainly contains a full and complete denial of the equity stated in the bill; and the documents called for by the complainants, go more to corroborate than to weaken that denial; and Hall's answer is also sustained by those of Stewart & Son, filed since the notice of the motion to dissolve.

Among the points, deducible from the charges made in the bill, the most important is, that the complainants Hillen and Williams were not interested with Stewart & Son in the Holstein. It would make an end of the case, and was therefore most strenuously urged by the complainant's counsel. But it is a remarkable circumstance, that, although the bill may be said to be argumentative with a view of inducing the court to believe this to be the fact, it is not in any part thereof expressly stated to be so. And the Chancellor is more particularly induced to notice this circumstance, from his recollection of having pointed it out as one of the objections to the bill that was first filed.

Upon the whole it is ordered, that the injunction heretofore issued in this case, be and the same is hereby dissolved.

The plaintiffs, by their petition, filed on the 9th of February, 1811, without oath or affidavit of any one, stated, that they believe, that further answers and documents which David Stewart could make and produce, relative to the matters and things contained in the bill of complaint, would materially promote the developement of the facts alleged in it, and particularly the following books, papers and documents, viz.: The ledger of the said David Stewart & Son, from the beginning of the year 1799, till the dissolution of their partnership; their journal, day book, &c. &c. And therefore pray, that David Stewart & Son may be ordered to

plaintiff is charged; but that they have done so, and indulged and settled with *Harding*, who was the principal debtor, in a manner

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produce in court all the aforesaid books, papers and documents, if in their possession or control; or if not, that they state particularly what has become of them, and in whose possession or control they now are.

11*th February*, 1811.—Kilty.—*Chancellor.*—The Chancellor has considered the within petition. The order prayed for cannot be made without a compliance with the requisites of the act of 1798, *ch.* 84.

After which one of the plaintiffs, Williams, filed his affidavit of the truth of the facts and allegations stated in their petition, asking for the production of books and papers.

15*th February*, 1811.—Kilty, *Chancellor.*—On considering again the within petition, together with the affidavit now annexed thereto: it is required and decreed, that David Stewart and David C. Stewart, defendants in the suit referred to, in the said petition, do forthwith produce to this court, the following books and papers, viz.: The ledger of David Stewart & Son, from the year 1799, till the dissolution of their partnership, &c. &c. or that they forthwith produce to this court copies of the said several books and papers certified by a justice of the peace; if the said books and papers respectively are in their possession or power. Provided, that inasmuch as the application is made by petition, and not by motion in court; any motion or cause shewn against this requisition and decree will be heard at any time during the first week of the ensuing February term.

A solicitor of the defendants having been heard in shewing cause against making this order absolute:

25*th March*, 1811.—Kilty, *Chancellor.*—During the present term, cause was shewn by R. G. Harper, counsel in this suit for Hall and Stewart, against the above decree; but on considering the argument urged by him, the Chancellor does not think the cause shewn to be sufficient against the said decree, which therefore remains absolute except as to the time of producing the said books and papers. Provided, that a copy of this order and of the said decree be served on the said D. Stewart and D. C. Stewart, or either of them, before the 10th day of April next.

On the 25th of July, 1811, David Stewart by his petition, on oath, stated, that the firm of David Stewart & Son being embarrassed in their commercial concerns, transferred all their property, estate and effects, including their books, papers, letters and accounts of every description, to Elias Ellicott, William Winchester, and John Munnykhysin who is since deceased, in trust for the benefit of their creditors; that David Stewart was appointed by them their agent to settle the affairs of the firm of David Stewart & Son, and in that capacity he has ever since held possession of those books and papers; that Ellicott the trustee objects to the removal of them; and therefore this defendant David Stewart submits, whether they are so far in his possession and control as to enable him to comply with the requisition.

25*th July*, 1811.—Kilty, *Chancellor.*—The Chancellor has already passed such orders on the subject mentioned in the within petition as he thought proper. If the books and papers were in the possession of any other person, he would be ordered to produce them. The sentiments expressed by Elias Ellicott, and his unwillingness to have the books removed, can have no effect on the court, and are not proper to be stated as an excuse for not complying with the order thereof.

After which the defendant having failed to produce all the papers as ordered:—

very prejudicial to the testator of the plaintiff, who was only the surety of *Harding;* and, therefore, that the plaintiff should be discharged. In answer to this statement of facts, *Magill*, as to some most material particulars, responds merely by way of hearsay from the defendant *Gittings;* and the answer of *Harding*, looking to the allegations of the bill, is that of a *particeps fraudis*, and as such cannot be allowed to be of any avail to *Magill*, the creditor

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27*th September*, 1811.—KILTY, *Chancellor.*—On motion of the petitioners, it is Ordered, that Stewart & Son produce and lodge in this court, such of the papers mentioned in the former order as are not yet exhibited, before the first day of November next.

After which, the case having been brought on for a final hearing, it was, on the 29th February, 1816, decreed, that the defendant Hall pay or refund to the plaintiffs the sum of $7,359 55, with interest from the 17th May, 1808, and costs.

CHAPLINE *v.* BEATTY.—This bill was filed on the 9th of January, 1807, by Joseph Chapline against Charles A. Beatty, Abner Ritchie, John T. Mason, and James Williams. It states, that the defendants Beatty and Ritchie had, as administrators of Charles Beatty, deceased, obtained a judgment in an action of debt against this plaintiff, for £351, with interest thereon from the 16th of February, 1791; and in an action on the case they had also obtained judgment against this plaintiff for the sum of £534 3*s.* 5*d.*, bearing interest from the 4th of December, 1801; which judgments were rendered at the same time upon an agreement between this plaintiff and the defendants Beatty and Ritchie, that there should be such deductions and discounts from them as could be made to appear within a limited time, to Walter S. Chandler; that this plaintiff had produced his vouchers to the arbitrator Chandler, who postponed the consideration of the matter to another time; that the defendants Beatty and Ritchie then produced other claims against this plaintiff, not embraced by the judgments; that the arbitrator, without notice to this plaintiff, or paying due regard to his vouchers, made and returned an award before the appointed time, by which he gave to this plaintiff credit for less than he was entitled to, and applied the payments to one of the judgments only, leaving the other to bear interest from the longest time; that afterwards the judgment in the action of debt was entered for the use of John T. Mason; and that in the action on the case for the use of James Williams, who had caused writs of *fieri facias* to be issued and levied on the property of this plaintiff for the whole amount. Whereupon the plaintiff prayed for general relief, and for an injunction to stay the further proceedings at law.

The plaintiff gave two separate injunction bonds, one to the defendants Beatty and Ritchie, for the use of Mason, and the other to Beatty and Ritchie, for the use of Williams, for the respective amounts of the several judgments.

9*th January*, 1807.—KILTY, *Chancellor.*—Let subpœna and injunction, or injunctions issue as prayed; provided, that any motion for dissolving shall not be delayed for want of the answers of the defendants Mason and Williams.

On the 18th of May, 1807, all the defendants put in their answers, in which they denied all the material matters of fact upon which the plaintiff's equity was founded. The answers of Beatty, Ritchie, and Mason, were sworn to before a justice of the peace, in the District of Columbia; and the clerk of Washington county, of that District, certified, that he was then and there duly commissioned as a justice of the

and alleged party to the fraud.(*n*) The loan of the $500 was made by the defendant *Gittings;* the note for it, on which the judgment at law was obtained, was given to him; and it is admitted, that he, as having been privy to the whole transaction, is able to speak of the facts from his own knowledge; and, therefore, it is important that he should answer, as well because he is disinterested, having settled his final account and been discharged as guardian, as because *Magill*, who claims under him, will be bound by his answer.(*o*)

It is true, that a defendant has no direct means of enforcing an answer to the bill from his co-defendant; but, he may urge forward the plaintiff to do his duty in that particular; and, certainly, at the instance of a defendant anxious to have the restriction of an injunction removed, the court would suffer no unreasonable delay from the plaintiff. A responding defendant may lay the plaintiff under a rule further proceedings, which the court will not hesitate to enforce so as to compel him to extract an answer from a tardy co-defendant with as little delay as possible; or else the bill may be dismissed and the injunction dissolved;(*p*) for, in equity as at

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peace. Upon these answers the defendants gave notice of a motion to dissolve; and on the 7th July, 1807, the injunction was thereupon dissolved.

(*n*) Bridgman *v.* Green, 2 Ves. 629.

(*o*) Osborn *v.* U. S. Bank, 9 Wheat. 832; Field *v.* Holland, 6 Cran. 24.

(*p*) Anonymous, 9 Ves. 512; Depeyster *v.* Graves, 2 John. Ch. Ca. 148.

Tonc *v.* Oliver.—This bill was filed on the 22d of October, 1803, by William Tong against Richard Oliver, and also Robert Berry and Peter Snyder, administrators of Benjamin Abbot. It states, that the plaintiff, in the year 1798, purchased of the intestate a tract of land in Pennsylvania; that he paid part of the purchase money, gave his bond for £300, being the balance, and obtained possession of the land; that Abbot gave an order on this plaintiff in favour of the defendant Oliver, for the whole sum due on the bond; that on presentation of the order, the plaintiff paid £200, and executed his bond for the remaining £100 to, and in the name of the defendant Oliver; that the land was subject to an incumbrance for £32 at the time of the sale, which the plaintiff would be compelled to pay and satisfy; and yet, that suit had been brought on the bond, judgment obtained, and an execution levied on the plaintiff's lands; that Abbot is since dead, and the defendants Berry and Snyder were his administrators; upon which an injunction was prayed for and granted to stay the proceedings at law.

On the 19th May, 1808, the defendants Berry and Snyder put in their joint answer; the purport of which is sufficiently noticed in the Chancellor's order. On the same day, the defendant Oliver not having answered, they obtained the usual order to give notice of a motion to shew cause why the injunction should not be dissolved at the next term.

1*st March*, 1809.—Kilty, *Chancellor.*—The motion for dissolving the injunction was made by the defendants' counsel, no counsel for the complainant being in court. But as, according to the rule and practice of the court, the defendants would have been entitled to a dissolution, if the answers were considered sufficient, it is

law, where there are necessarily several defendants, the court will not continue the restriction which has been imposed upon one of

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deemed proper to determine the case as it stands, without any argument by the complainant.

The answer of Oliver is not filed. The Chancellor, without giving a positive opinion, is inclined to think, that unless it should be shewn, that he had some knowledge of the transaction, or that his answer might be material, it might be dispensed with, as he was only the nominal plaintiff at law.

But the answers of Berry and Snyder are not considered sufficient. The answers of administrators must always be taken with a view to the reasons for their belief or knowledge of facts. In this case they state such contradictory circumstances as give room to doubt their knowledge of them.

The bill states, that the £300, for which the plaintiff gave his bond, was the half of the purchase money. The answer, without a positive denial of that fact, speaks of it as the whole consideration. The defendants allege, that the £200, received by Oliver from Tong, included the £32 lien on the Pennsylvania tract; and they afterwards state, that Tong purchased the land subject to that incumbrance, and many others; and the argumentative part of their answer, as to the £300, has been already noticed. They further allege, that they believe the £32 was taken into consideration in Tong's bond to Abbot; and, that they knew it was deducted in the bond given to Oliver. So that, according to their statement, this sum has been twice allowed; although the land was sold subject to it.

It appears on the whole, that it will be the most equitable course to continue the injunction till final hearing or further order, with a view to ascertain the real state of the transaction; and it is ordered to be continued accordingly.

After which the responding defendants, with a view to urge forward the plaintiff to extract an answer from the defendant Oliver, or to bring the case to a final hearing, called on the court to compel him to proceed.

29th December, 1809.—KILTY, *Chancellor*.—On application of the defendants, rule further proceedings by the fourth day of February term, 1810; provided a copy of this order be served on the complainant, or his counsel, before the first day of February next.

On the part of the responding defendants, the case was afterwards again submitted to the court on notes by the defendants' solicitor, in which it was stated, that this cause stands under a rule further proceedings, which expired on the fourth day of February term; that Oliver had not answered, and the responding defendants had no means of compelling him to answer. Upon this state of the case the defendants, who had answered, prayed a dismissal under the rule; or that the injunction be dissolved, upon such terms as the Chancellor may deem proper.

7th April, 1810.—KILTY, *Chancellor*.—On that part of this application, praying for a dissolution of the injunction on the former notice, the Chancellor refers to his order of the 1st of March, 1809. On that part praying for a dismissal on the rule, the Chancellor considers the session of the court is not at present open for such a motion. And on the application in writing by the counsel for the complainant, it is ordered that a commission issue to the persons named by him, unless commissioners are named by the defendant so as to be struck before the first day of May next. Provided a copy of this order be served on the defendant's counsel before the 20th inst.

After which a commission was issued, testimony taken, and the case submitted for final hearing; without the answer of the defendant Oliver.

them, unless the plaintiff shews, that he is using all due diligence to have all the others brought before the court.(*q*)

These defendants, who now ask for a dissolution of this injunction, have not yet, by a rule further proceedings, required the plaintiff to prosecute her suit without delay; and, consequently, they cannot justly complain of the injunction being continued until the filing of the answer of the defendant *Gittings;* which, it is evident, may bring into the case an acknowledgment of facts, that may go far to sustain, if not entirely to support the equity upon which the plaintiff's injunction rests. Hence, as there is now no ground to impute to the plaintiff any unreasonable neglect in the prosecution of her suit; and the answer of a defendant, under whom this creditor, *Magill*, claims, who, it is admitted, can speak from his own knowledge of some of the material facts charged in the bill, has not yet been put in; the hearing of the motion to dissolve cannot be taken up until his answer has been brought in; or, until it may be inferred, from the laches of the plaintiff, in not endeavouring to have it brought in, that it would contain nothing likely to sustain her case; or until such implied notice of the bill has been given to the non-responding defendant, if he be not resident within the State, as will enable the court to proceed without his answer.(*r*)

23*d May*, 1810.—KILTY, *Chancellor*.—The commission, which was ordered, at the present term, has been returned, and the case is submitted for final hearing; an abstract being made on the part of the defendants.

Although the real state of the transaction is not discovered very clearly from the proceedings; yet, as it appears in proof, that the complainant refused to produce the agreement, thereby adding weight to the testimony of Peter Snyder respecting it, it is not considered necessary to continue the injunction in force. Whereupon it is *Decreed*, that the injunction be dissolved, and the bill dismissed, but without costs.

(*q*) Gow. Part. 179.

(*r*) PAUL *v.* NIXON.—This bill was filed on the 25th of August, 1796, by John Paul against John Nixon, Benjamin Fuller, John Donaldson, and David H. Cunningham, surviving executors of William West. The bill states, that the plaintiff had, on the 23d of December, 1777, given his bond to the defendants' testator, with a condition for the payment of the sum of four hundred pounds, which he signed without reflection as to the interest reserved; that to correct the mistake in this respect, the defendants' testator, soon afterwards, signed and delivered to the plaintiff a written agreement, whereby he, the obligee, agreed that he would demand no more than three per cent. per annum until the debt was paid; that this agreement the plaintiff had lost; that the defendants had brought suit and obtained judgment for the whole amount, with legal interest, without giving him credit for certain payments, which he had made; and without having the sum really due adjusted, according to the terms upon which the judgment was given, which were, that the amount of interest accruing on the bond should be ascertained by William McLaughlin.

Whereupon it is ordered, that the injunction heretofore granted in this case be and the same is hereby continued until the coming

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Whereupon, the plaintiff prayed for an injunction to stay the proceedings at law, &c., which was granted as prayed.

The defendants put in their answer, in which they admit, that they had obtained a judgment as stated; and as to the agreement, they aver that they have no knowledge of it; but they say, that they verily believe, that there never was any such instrument of writing made by their testator. In regard to the payments alleged to have been made by the plaintiff, the answer is entirely silent.

Upon these circumstances the case was submitted on the notes of the solicitors of the parties.

7th January, 1800.—HANSON, *Chancellor*.—This cause is before the Chancellor on a motion to dissolve made on filing the answer. The bill, answers, exhibits, arguments of counsel in writing, and all other proceedings, have been by him read and considered.

By the written argument of the defendants' counsel, the Chancellor is informed, that they submit the cause for final decision on the bill and answer, but there is no submission on the complainant's part; and it is only the motion to dissolve, which was made as aforesaid by the defendants' counsel on putting in their answer, that the Chancellor can decide on at present without the complainant's consent.

In fact the principles and practice of this court seem, on this occasion, not to have been recollected. It is therefore proper to say something relative to the said principles and practice.

When a bill is filed stating, on oath, just grounds to be relieved from a judgment at law, the complainant, on filing likewise a bond with sureties approved by the Chancellor, for securing to the defendants the money recovered *nisi*, &c. obtains an order for an injunction, which is to continue until further order. If the defendant, by his answer on oath, denies those matters, on which the injunction was obtained, on motion to the Chancellor he generally obtains an order dissolving the injunction. The complainant, however, if he thinks proper, may proceed, after the dissolution, to establish, by proof, the allegations of his bill; and if he succeeds, either the injunction is renewed, or other relief is granted by the final decree, as is proper for the circumstances of the case.

Every complainant, on the filing of the answer by the defendant, is entitled to have the cause set down for final hearing on the bill and answer. And for this plain reason: by so doing he admits every thing contained in the answer to be true, and that nothing contained in his bill is true except what is admitted by the answer. So that it is impossible for the defendant to be injured by a submission on bill and answer. But, if a defendant were entitled to have the cause set down on bill and answer, it is plain, that he could thereby preclude the complainant from the opportunity of establishing his bill by indifferent testimony, and would in short have the cause only in his own power. For, it cannot be unknown, that on final hearing, nothing alleged in the bill is to be considered as established unless admitted by the answer, or proved by indifferent testimony. If indeed the defendant were entitled to have the cause set down for final hearing, on bill and answer, it must be on terms similar to those of the complainant's setting down; viz. that every thing contained in the *bill* is true, that is to say, the rule must be reversed. But there is no such practice, nor does it by any means, in the present case, appear to be the meaning of the defendants to admit the complainant's allegations. On the contrary, they have denied, so far as they can deny, the said allegations.

There never has been a case in this court, where the defendant had less reason

in of the answer of the defendant *John F. Gittings*, and until further order.

The defendant *Magill*, by his petition, referring to the previous proceedings, stated, that the defendant *Gittings*, for a long time previous to the filing of the bill, and then did reside out of the limits of this State; which, as he believes, was known to the plaintiff when she instituted this suit; and yet, she had not stated the fact in her bill and prayed for an order of publication, in place of a *subpœna* against him; whereupon the petitioner prayed, that the plaintiff might be compelled to proceed against the defendant *Gittings* without delay, &c.

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than the present defendants have, to expect success on a motion to dissolve, made on filing the answer, without any submission on the part of the complainant for a final decision. Had the complainant made such a submission, it would have amounted to a total abandonment of his application for relief, because in case of such submission, as has already been said, every part of the answer would be considered as admitted; and no part of the bill, except what is admitted by answer, would be of any avail. Of course the decree would be for immediate dissolution and dismission of the bill.

The injunction was granted on two grounds. The bill alleged, 1st, an agreement in writing of the deceased to take only *three* per cent. interest, instead of *six*, for which judgment is entered: 2d, the payment of a sum for which no credit is given. The answer does not expressly deny the agreement; although the defendants say they do not believe that it ever existed. As to the payment, which is the most substantial ground, the answer says not a syllable. How then is it possible, on the present motion, to expect an order for dissolution.

The Chancellor has taken the trouble of giving a full explanation; because it is his custom, aim, and wish, to have the principles and practice of this court understood, and particularly where some of the parties are not residents of this State.

As the counsel complains of delay, and mentions the anxiety of his clients to obtain an early termination of this cause, the Chancellor must aver, that little delay has proceeded from this court. He will go further, as he conceives he may do with propriety, and suggest what is proper to be done for expediting the cause. The defendants may obtain a rule for further proceedings, &c. This will either oblige the complainant soon to take out a commission, or will soon put him out of court. And if a commission be taken out, a little diligence and vigilance on the part of the defendants will obtain an early return of the commission; or put it in their power to shew, that delay is sought by the complainant.

Now in cases of injunction, obtained on filing the bill, the Chancellor has always thought it his duty to discourage, as much as he could, consistently with a fair administration of justice, all studied or needless delay on the part of the complainant.

It is ordered, that the injunction in this cause heretofore issued, shall continue until final hearing or further order.

After which, on the 17th of December, 1803, by direction of the plaintiff, the injunction was dissolved, and the bill dismissed with costs.

15*th November*, 1825.—Bland, *Chancellor*.—If the plaintiff fails to proceed against the defendant *John F. Gittings*, for the purpose of compelling him to appear and answer, or of having the bill, as against him, taken *pro confesso*, or to cause publication to be made against him, as an absent defendant, on or before the tenth day of the next term, then the other defendants may again move, according to the usual course, to have the injunction dissolved.

After which the plaintiff, with the leave of the court, so amended her bill as to state, that the defendant *Gittings* was a nonresident; and, on the 1st of February, 1826, obtained an order of publication against him in the usual form. On the 27th September, 1826, the defendant *Gittings* filed his answer, after which the motion to dissolve was renewed.

3*d March*, 1827.—Bland, *Chancellor*.—This case having been submitted on the motion to dissolve the injunction, and all the defendants having now so answered, as completely to remove every ground of equity set forth in the bill, it is Ordered, that the injunction heretofore granted be and the same is hereby annulled and dissolved.

MARGARET HALL'S CASE.

A widow, who elects to take the estate devised to her, in lieu of dower, is to be deemed a purchaser for a fair consideration to the value of her dower, and must have her claim sustained as a lien, to that extent, in preference to creditors.

This case arose upon a creditor's bill, filed on the 5th of October, 1825, by *George Mackubin* and *Margaret Hall*, the widow and executrix of *Joseph Hall*, deceased, against his devisees, *Samuel Matthews*, and others; alleging, that his personal property was insufficient to pay his debts, and praying, that his real estate might be sold for that purpose. A decree was passed on the 30th of June, 1826, for the sale of the realty accordingly; and the trustee reported, that he had made sale of a part of it, which was finally ratified on the 1st of March, 1827.

On the first of March, 1827, the plaintiff, *Margaret*, by her petition stated, that her late husband had, by his last will, devised to her a large portion of his estate, to hold a part during her life,

and another part for a term of years; that she had elected to take under the will of her husband, immediately after his death, when she was unacquainted with his affairs; but that it is now ascertained, that the claims against his estate will absorb so much of it, as, if paid to her exclusion, will deprive her of all benefit intended by the will; and leave her in a much worse situation than if she had rested altogether upon her common law rights. And, therefore, as her election was improvidently made, and at a time when she was destitute of the information which alone could enable her to act knowingly upon the subject, she prays that it may be annulled, that she may be allowed the value of her dower, or be relieved according to the nature of her case, &c.

5th March, 1827.—Bland, *Chancellor.*—This case having been submitted on the application and petition of *Margaret Hall*, the proceedings were read and considered.

The will of the deceased husband of this widow lay before her, and presented to her a choice between the estate therein bestowed, and that given by the law. In her election to take under the will, there is no apparent room even to suspect fraud, nor has the existence of any been intimated; and it is difficult to perceive how there could have been any mistake. But, supposing it possible to show that a mistake had occurred, I should require from her a strong and clear case of misapprehension. She has heretofore formally made her election in the manner prescribed by law, and has solemnly reaffirmed that choice by bringing this suit. An election thus deliberately made, repeated and adhered to, ought not to be lightly shaken or easily annulled. This widow must, therefore, be held firmly bound by her election; and can have no relief, but such as may be altogether compatible with the choice she has thus made.(*a*)

A devise, which is merely of the nature of a donation, or that appoints persons to take as heirs in place of those designated by the law, must certainly be considered as void against creditors. But a devise in lieu of dower, is one of a different character, and of much higher merits. It discharges a highly favoured debt due from the testator; it relieves his real estate from a lien imposed by the law in favour of his wife, in preference to all others, with which he himself could have encumbered it, by any contract of his own. In the language of the act of Assembly, a widow electing to take

(*a*) Butricke *v.* Broadhurst, 1 Ves. jun. 171; S. C. 3 Bro. C. C. 88; Wake *v.* Wake, 1 Ves. jun. 335.

under the will of her husband, is to "be considered as a purchaser with a fair consideration."(*b*) It is clear, therefore, that this devise is fraudulent, as against creditors, only so far as it exceeds the value of the dower, in lieu and discharge of which, it was given, and has been accepted.

The creditors have associated themselves with the widow and devisee of the deceased, and have asked to have the real estate sold for the payment and satisfaction of all. But these creditors now, it seems, propose to have their claims first satisfied, in preference, and exclusion of the devise to the widow. They who are the widow's opponents, would thus bind her to her election to take under the will, which satisfied her claim that had a preference over theirs; and yet they would leave her to take, by that devise, nothing, or less than the amount of her legal claim. This cannot be allowed. They who ask equity must do equity. These creditors must either permit the widow to take to the whole amount under the will, as is her choice, or allow her to obtain full satisfaction for her dower; because to the value of that, at the least, she is both at law and in equity, "a purchaser with a fair consideration;" and to that extent, therefore, the devise must be sustained. The widow is clearly entitled to one, or the other; either the devise, or the dower; and since her taking the whole of the subject devised, which was and is her choice, has been objected to, she must be allowed to take, as devisee, to the full value of the dower which she has relinquished, but no more.(*c*)

Therefore it is Ordered, that the said *Margaret Hall* be, and she is hereby allowed one-seventh part of the proceeds of the real estate in the proceedings mentioned, in bar and satisfaction of all that portion of the real and personal estate devised to her by her late husband, *Joseph Hall*, and which property so devised she had elected to take in lieu of her dower.

(*b*) 1793, ch. 101, subch. 13, s. 5; Sug. V. & P. 257.—(*c*) Burridge *v.* Bradyl, 1 P. Will. 127; Blower *v.* Morret, 2 Ves. 420; Davenhill *v.* Fletcher, Amb. 244; Heath *v.* Denby, 1 Russ. 543.

HANNAH K. CHASE'S CASE.

Where a matter, which is properly the subject of a petition, is brought before the court in that form, the new facts therein set forth, which are not denied by a written answer on oath, must be taken to be true.

The appointment of a receiver does not involve a determination of any right; but it can only be made at the instance of a party who has an acknowledged interest, or a strong presumptive title in himself alone, or in common with others; and where the property itself, or its rents and profits are in danger of being materially injured or totally lost.

If a defendant demurs and pleads to the same matter, his plea overrules his demurrer; and so if he pleads and answers to the same matter, his answer overrules his plea.

To make a decree a good bar in a subsequent suit, it must be shown, that the matter of the bill was *res judicata*; that there was an absolute determination by the court that the party had no title.

A solicitor is not permitted to reveal the confidential communications made to him by his client, either before or after the termination of the suit; but, as it is the privilege of the client, he may waive it, and thus make the solicitor a competent witness.

An absolute sale to the husband, with a condition for a re-purchase, not being a mortgage, vests in him an estate in fee simple, of which his wife is dowable.

The acknowledgment of the wife, in the form prescribed by the act of Assembly of a lease for years made by her husband, can only operate as a bar of her dower during, and to the extent of the lease.

In equity the widow may have an account of the rents and profits of her dower from the time her title accrued.

Where the property is incapable of division, dower may be assigned in the form of a rent, distrainable of common right.

This bill was filed on the 22d of November, 1821, by *Hannah K. Chase*, as the widow of the late *Samuel Chase*, against *Samuel Chase*, and others, his heirs, and some others, to recover dower in a house and lot in the city of Baltimore, called the Fountain Inn. To which bill all the defendants answered, and testimony was taken. The heirs alleged, that the late *Samuel Chase* had not such a legal interest in the property in question as to entitle the plaintiff to dower; and that even if she ever had been entitled to dower, she had relinquished her claim, as was shown by the records and the agreement by which former suits, in relation to this same claim, had been brought to a close. The letter of the solicitors of this plaintiff, dated 28th of September, 1816, and addressed to her, in relation to the bringing of those then pending suits to a close, is in these words:

"DEAR MADAM—

"Understanding that an amicable adjustment of your suits in chancery with the legal representatives of the late Judge *Chase*, was likely to take place, conformably to your request, we have

turned our attention to the points in controversy involved in those suits, and particularly to the property known and distinguished by the name of the Fountain Inn, in which we are of opinion, you have no title of dower during *Bryden's* lease, having relinquished your dower therein during said lease, which will expire in 1821. Whether, upon the termination of said lease, you will be entitled to dower, *is a question of some difficulty*, and perhaps can only be solved by some further proof in point of fact, relative to the nature and effect of the contract between the late Judge *Chase* and *Bryden*. If it depended entirely upon the title papers, we should be of opinion, that dower in that property would be clearly demandable. But papers have been exhibited with the answer of Mr. *T. Chase*, which create a difficulty in determining whether the original contract with *Bryden* was in the nature of a mortgage, or an absolute purchase. If the first, dower is not claimable; if the latter, you are entitled to it as a matter of course. It was certainly not designed to have the effect of a mortgage by the late Judge *Chase*. We do not think, that the difficulty should prevent a settlement as to the residue of the property, in which dower is asserted, in relation to which, we have reason to believe, no opposition will be made to your claims. If before the lapse of five years, the question as to *Bryden's* property should not be settled, the question between you will be narrowed down to a single point, in the adjustment of which, we suppose, no great difficulty can take place. We are, &c. *John Stephen*, *A. C. Magruder*."

The agreement, upon which the suits spoken of in the aforegoing letter, were brought to a close, was marked in this suit as exhibit S. M., and is expressed in these words:

"*Hannah K. Chase* and *John P. Paca* v. *Samuel Chase* and others; *Hannah K. Chase* v. *Samuel Chase* and others; and The same *v.* The same:

"It is agreed, that a decree shall pass in the first of the above cases, for the payment of the sums of money, with interest thereon, secured to be paid to the complainant *Hannah K. Chase*, by the two bonds in the proceedings mentioned and exhibited, executed by the Honourable *Samuel Chase*, deceased; one to *John P. Paca*, of Queen Ann's county, as trustee of the said *Hannah K. Chase*, dated on the 14th day of February, A. D. 1809, for the payment of two thousand five hundred dollars; the other to the said *John P. Paca*, as trustee aforesaid, dated on the tenth day of July, A. D. 1810, for the payment of one thousand four hundred and

thirty-seven dollars, together with costs of suit. It is also further agreed, that in the two last of the above causes, decrees shall pass, giving the complainant dower in the following tracts, pieces or parcels of land, to wit, one lot on Jones' Falls; one lot called the Garden, and one other lot adjoining the same, (the said three lots or parcels of land being the same now advertised to be sold on the 7th of August next, by the trustees for the sale of the real estate of *Samuel Chase*, deceased;) also in a lot of ground situated on the west side of Jones' Falls, conveyed by the said *Samuel Chase*, deceased, to *William Camp*, sometime in the month of April, A. D. 1811; also in two lots between Water and Pratt streets, in the city of Baltimore, conveyed by the said *Samuel Chase*, deceased, to a certain *John Gross*, and by the said *Gross* afterwards conveyed to *Andrew Myer;* also in a certain lot or parcel of ground, advertised by the said trustees as aforesaid, situate on Whetstone Point: provided it shall appear to the satisfaction of the Chancellor, by the exhibition of title papers, or otherwise as he may order, that the said *Hannah K. Chase* hath a right to dower in the same. And it is further agreed, that a compensation in money shall be paid to the complainant by the defendants, for and in lieu of her dower in the property above mentioned; and that such compensation shall be fixed by the Chancellor, upon evidence offered to him of the value of the said respective pieces or parcels of land by the actual sales, where sales are to be made by the trustees as aforesaid; and for want of sales by depositions, showing such value, to be taken before some justice of the peace for Baltimore county, residing in the city of Baltimore, by either party, upon giving three days' notice. And it is further agreed, that the said bills be dismissed as to all the property in the proceedings mentioned, not specified and included in this agreement, and that the complainant pay the costs. It is agreed, that all sums for which Mrs. *Chase* may be indebted to the estate of *Samuel Chase*, deceased, for furniture, &c. obtained from the administrator, or at the appraised value, shall be deducted from her claim; the amount whereof shall be ascertained by *Luther Martin* and *Jonathan Meredith*." This agreement was signed by *H. K. Chase*, *T. Chase*, *S. Chase*, and their solicitors.

Several deeds were exhibited, proved and relied on by the parties, to show the nature of the title of the plaintiff's late husband to the property, in which she now claimed dower. The deed dated on the 4th of February, 1806, and on the same day acknowledged and delivered from *James Clarke* to *Samuel Chase*, the

late husband of the plaintiff, recites and sets out his title in the following words:

"Whereas *Harry Dorsey Gough*, on the fifth day of April, in the year seventeen hundred and eighty-six, agreed with *Daniel Grant* of Baltimore town, now the said city, to sell and give his bond to convey to him, his heirs and assigns, clear of all incumbrances, all that lot or parcel of ground lying in Baltimore town and contained within the following courses and distances, to wit: begining, &c. &c. with its appurtenances, for the consideration of three thousand seven hundred and eighty pounds in English guineas at thirty-five shillings each, and weighing five pennyweights and six grains, payable on the fifth day of April seventeen hundred and ninety-three, with annual interest thereon until paid. And whereas the said *Harry Dorsey Gough*, afterwards, to wit, on the twenty-ninth day of September, in the year seventeen hundred and ninety-five, agreed with the said *Daniel Grant*, to sell and give his bond to convey to him, his heirs and assigns, clear of all incumbrances, all that other lot or parcel of ground lying in Baltimore town aforesaid, now the said city, and situate immediately below the buildings of the said *Daniel Grant*, to wit: beginning, &c. &c., for the consideration of five hundred and twenty-one pounds in English guineas, at thirty-five shillings each, and weighing five pennyweights and six grains, payable in one year, with annual interest thereon until paid. And whereas the said *Daniel Grant*, afterwards, to wit, on the thirtieth day of September, in the year seventeen hundred and ninety-five, sold the said two lots or parcels of ground with the appurtenances unto *James Bryden* of the said city of Baltimore, for the consideration of the sum of three thousand four hundred and sixty-four pounds, six shillings and five pence, current money, to be paid by him to the said *Harry Dorsey Gough*, and of the sum of five thousand and thirty-five pounds, thirteen shillings and seven pence of like money, to be paid by him the said *James Bryden*, unto him the said *Daniel Grant*. And whereas the said *James Clarke*, with *John Smith*, became security for the said *James Bryden*, for the payment of the said two several sums of money; and the said *Daniel Grant* for their indemnification, on the said day and year last mentioned, assigned to them, the said *James Clarke* and *John Smith*, all his right, title and interest of, in and to the said two bonds of the said *Harry Dorsey Gough*, for the conveyance of the said two lots or parcels of ground in the said two bonds mentioned. And whereas the said *James*

Bryden afterwards paid unto the said *Daniel Grant*, the said money with the interest due thereon: and whereas the said *James Clarke*, at the request of the same *James Bryden*, hath paid unto the said *Harry Dorsey Gough*, the sum of seven thousand two hundred and sixteen dollars and forty-two cents, money of the United States, being the balance due unto him for principal and interest; and thereupon the said *James Bryden* delivered up unto the said *Harry Dorsey Gough*, his said two bonds for conveyance as aforesaid, and the said *Harry Dorsey Gough* at the request of the said *James Bryden*, did on the third day of February, in the year one thousand eight hundred and six, convey and make over the said two several lots or parcels of ground with the appurtenances, unto the said *James Clarke*, his heirs and assigns, for ever, as by his deed to the said *James Clarke*, duly executed and acknowledged, reference being thereunto had, will fully appear. And whereas the said *Samuel Chase* on the day of the date of this deed, at the request of the said *James Bryden*, hath paid to the said *James Clarke* the sum of seven thousand two hundred and sixteen dollars and forty-two cents, being the sum paid by him for the said *James Bryden* to the said *Harry Dorsey Gough* as abovementioned. And whereas the said *Samuel Chase*, on the date of this deed, hath also paid to the said *James Bryden* the sum of ten thousand two hundred and eighty-three dollars and fifty-eight cents, the receipt whereof is testified by his being one of the subscribing witnesses to the execution of this deed. Now this indenture witnesseth, that the said *James Clarke*," &c. conveying to *Samuel Chase* an absolute estate in fee simple.

The lease from the late *Samuel Chase* to *James Bryden*, bears date on the 26th day of February, 1806, of this property for the term of fifteen years, reserving an annual rent of two thousand dollars, is in the usual form, and the acknowledgment of it by *Chase* and his wife, the present plaintiff, is in the form required by law. The recital and condition of the bond in the penalty of forty thousand dollars, of the same date, from *Samuel Chase*, the plaintiff's late husband, to *James Bryden*, is expressed in these words:

"Whereas it has been agreed, on the day and year abovementioned, by and between the said *Samuel Chase* and the said *James Bryden* as follows, to wit: that the said *Samuel Chase*, his heirs and assigns, at and upon the expiration of fifteen years from the day of the date hereof, in the year of our Lord one thousand eight hundred and six, and not before, and at any time within one

year from the expiration of the said fifteen years, and not afterwards, and upon the payment to him, the said *Samuel Chase*, his heirs or assigns, by the said *James Bryden*, his heirs, executors, administrators or assigns, of the sum of seventeen thousand five hundred dollars, in specie money of the United States, or gold coins as established by act of Congress, passed on the ninth day of February one thousand seven hundred and ninety-three, and not in paper of any kind; although the said *James Bryden* or his assigns should by law be authorized to pay paper money in lieu of specie; and in case of the said *James Bryden* or his assigns not paying the said sum of seventeen thousand five hundred dollars in manner as aforesaid at the expiration of the said fifteen years, but within the one year thereafter abovementioned, then upon the payment of the said principal sum, with legal interest thereon until payment within the said year, in manner and form aforesaid, shall and will well and truly convey by deed duly acknowledged and recorded according to law, unto the said *James Bryden* and his heirs, all that lot or parcel of ground lying in Baltimore town, now the said city of Baltimore, and contained within the following courses and distances, to wit: beginning for the same, &c. &c. together with all buildings and improvements erected upon the said two lots or parcels of ground, and which are particularly described in a deed duly acknowledged and recorded, and bearing date on the fourth day of February last, for the conveyance of the said two lots or parcels of ground by *James Clarke* to the said *Samuel Chase*, and in a deed bearing date on the day of the date hereof, for the lease of the said two lots or parcels of ground by the said *Samuel Chase* to the said *James Bryden*, for the term of fifteen years from the date of the said lease, and free from all incumbrances and right and title of dower whatsoever. Now the condition of the said obligation is such, that if the said *Samuel Chase*, his heirs or assigns, shall well and faithfully observe, perform and keep the said agreement on his part, according to the true intent and meaning thereof, then the said obligation shall be void, otherwise in full force and virtue in law."

All the other material circumstances of the case are sufficiently noticed by the Chancellor in delivering his opinion after the final hearing.

On the first of March, 1826, the plaintiff filed her petition, in which she stated, that the defendant, *Samuel Chase*, who had the control and management of the property in which she claimed

dower, had, since the institution of this suit, taken the benefit of the insolvent law; and that if he were permitted to continue either directly or indirectly to receive the rents and profits, they would be wholly lost. Upon which she prayed that a receiver might be appointed. Upon this petition an order was passed, allowing the defendants to show cause on the 22d of the same month. After which the matter was brought up for a final decision upon the circumstances as stated by the court.

26th April, 1826.—Bland, *Chancellor*.—The petition for the appointment of a receiver standing ready for hearing, the parties were heard by counsel, and the proceedings read and considered.

The defendants have not thought proper to put in a formal answer in writing to the plaintiff's petition, but have been content with showing cause verbally. If a petition of this kind, bringing before the court a matter which could not have been made the subject of a mere motion, because of the necessity of putting upon the record the new facts therein set forth, and apprising the party of all the circumstances on which the application is made, so as to enable him to controvert them, if he can; be not regularly and properly denied by a written answer on oath, the whole, or so much of it as is not denied must, by analogy to the course of this court in similar cases, be taken to be true.(*a*)

I have so recently had occasion to consider the general nature and utility of the power of this court to appoint a receiver,(*b*) that it will be unnecessary upon this application to notice what has been said in argument as to the novelty, or the unsettled nature of the authority of this court to make such an appointment, or as to the very oppressive purposes to which, it is said, it may be applied. It will be sufficient here again to observe, that I consider the matter as having been long since fully settled, and the power as one of as great utility as any which belongs to the court.

It has been mainly urged, that the court will not appoint a receiver against the legal title, but upon very special and strong ground. This is admitted. But the matter in controversy between these parties is a legal title, or it is nothing. This is a bill for dower, a mere legal demand; and the relief the plaintiff seeks is to have her particular estate set apart out of the general estate of the defendants, and to have the rents and profits thereof accounted for.

(*a*) Shipbrooke *v.* Hinchingbrook, 13 Ves. 393; 2 Harr. Pra. Chan. 40, 129, 133.
(*b*) Williamson *v.* Wilson, 24th April, 1826, post 000.

To this it is objected, that a receiver cannot be appointed, because the claim of the plaintiff does not extend to the *whole*, but only to one-third of the property in controversy.

The appointment of a receiver does not involve the determination of any right; or affect the title of either party in any manner whatever: but still an application for such an appointment can only be made by those who have an acknowledged interest; or where there is strong reason to believe, that the party asking for a receiver will recover. I am of opinion, that the plaintiff has a sufficient presumption of title, to rest this application upon.(*c*) But unless she has also shown, that the rents and profits are in imminent danger, a receiver cannot be appointed. A manifest abuse of a trust by an habitual and prospective course of dealing, bringing the property into danger, has been held to afford sufficient ground for the appointment of a receiver: but in no case has there been the least hesitation in making such an appointment, where the party in the actual receipt of the rents and profits was shown to be insolvent. Here the property is in the hands and under the control of the defendant *Samuel Chase:* and it is shown by the exhibits attached to the petition, that he has, pending this suit, actually obtained the benefit of the insolvent laws. He is, therefore, legally and in fact insolvent. Hence, it clearly appears that the rents and profits of the property in question are exposed to imminent danger, or indeed to inevitable loss.

A receiver is appointed for the benefit of the interested party who makes the application, and for any others who may choose to avail themselves of it, and who may have an interest in the property proposed to be put into the hands of a receiver. The immediate moving cause of the appointment is the preservation of the subject of litigation, or the rents and profits of it, from waste, loss or destruction; so that there may be some harvest, some fruits to gather after the labours of the controversy are over. The ulterior objects of the appointment are those contemplated by the suit itself; they are the several kinds of relief, which may be asked for and obtained by the complainant's bill. Where the plaintiff claims the whole, as a purchaser or by a superior title, if he succeeds, it eventuates that the appointment was entirely and exclusively for his benefit.(*d*)

(*c*) Stitwell *v.* Williams, 6 Mad. 49; Clark *v.* Dew, 1 Rus. & Myl. 103; Davis *v.* Marlborough, 2 Swan. 146.—(*d*) Lloyd *v.* Passingham, 16 Ves. 59; Davis *v.* Marlborough, 2 Swan. 125.

But so far from such being the only kind of cases in which a receiver has been appointed, they are in fact of the most rare occurrence. Where the plaintiff was a mortgagee, or a creditor suing in his own right alone, or for himself and other creditors, whose claims might or might not cover the whole amount;(*e*) or where the object of the bill was to obtain a fair division of the property and to have debts paid;(*f*) or where the portions to which the contending parties would be respectively entitled was uncertain until a division should be made by the court; or where one tenant in common took the whole rents and profits to the exclusion of his co-tenant; if the merits of the case required it, a receiver has been appointed and directed to take charge of the whole estate. And at the instance of a plaintiff who claimed as a purchaser, such an appointment has been made, even before answer, although it was urged in argument, that a married woman, who claimed a life estate under a post nuptial settlement, would be stripped by it of "her only means of defence and subsistence."(*g*) It does not appear from any of the cases, that such an objection as this now relied upon, has ever before been made by any one in relation to the appointment of a receiver; and, consequently, it cannot be regarded as of any weight whatever. I shall, therefore, put a receiver upon this estate. But as no person has been nominated by the parties for that office, I must let the selection of a suitable person lay over until I hear from them.

Ordered, that a fit and proper person be appointed as a receiver, as prayed by the complainant's petition, with full power and authority to enter upon and take possession of the messuage, and tenement in the bill of complaint mentioned; and to take care of, rent, or otherwise dispose of the same pending this suit, in such manner as he may deem most advantageous to the parties interested therein, subject to the further order of this court. And also with full power and authority to demand, sue for and recover any rent now due or which may hereafter become due for the same. And for the faithful performance of the trust reposed in such person to be appointed to act under this order, or which may be reposed in him by any future order of this court in the premises,

(*e*) Thomas *v.* Dawkins, 3 Bro. C. C. 508; Bowersbank *v.* Collasseau, 3 Ves. 165; Wilkins *v.* Williams, 3 Ves. 588; Hughes *v.* Williams, 6 Ves. 459; Bryan *v.* Cormick, 1 Cox. 422; Dalmer *v.* Dashwood, 2 Cox. 378.—(*f*) Skip *v.* Harwood, 3 Atk. 564. (*g*) Metcalfe *v.* Pulvertoft, 1 Ves. & Bea. 180.

he shall give bond to the State of Maryland in the penalty of ten thousand dollars, with surety or sureties to be approved by the Chancellor. The compensation of such receiver shall be hereafter determined on a consideration of his trouble, skill, and diligence in the premises. And it is further ordered, that on the fifth day of May next, a proper and suitable person will be appointed a receiver under this order; provided, that on or before that day the parties may nominate and recommend for the appointment to the Chancellor, such person or persons as they or either of them may think proper.

Two of the defendants, *Matilda Ridgely* and *Ann Chase*, on the 4th of May 1826, filed their petition, objecting to the appointment of a receiver, which petition was then submitted to the Chancellor: but a decision upon it was postponed until a nomination of a receiver should be made. After which, on the 10th May 1826, a nomination was made, and the case was again submitted to the Chancellor.

9th June, 1826.—Bland, *Chancellor*.—Ordered, that the petition of *Matilda Ridgely* and *Ann Chase*, be dismissed with costs; and that *Peter H. Cruse*, of the city of Baltimore, be and he is hereby appointed a receiver under and according to the order of the 26th of April last.

After a receiver had been thus appointed and he had taken the property under his care, the case was prepared and brought on for a final hearing.

28th April, 1827.—Bland, *Chancellor*.—This case standing ready for hearing, the solicitors of both parties were fully heard, and the proceedings read and considered.

It appears from the bill as amended, and the plaintiff's exhibits, that the late *Samuel Chase*, after and during his marriage with the plaintiff, became seized in fee simple of a certain real estate, situated within the city of Baltimore, called the Fountain Inn; which property, on the 26th day of February, 1806, he leased to *James Bryden* for the term of fifteen years, reserving an annual rent of 2000 dollars. The plaintiff, on a privy examination, acknowledged the validity of this lease, and made a relinquishment of her dower in the usual form. *Samuel Chase*, the husband of the plaintiff, died on the 19th April, 1811. The lease to *Bryden* expired on the 26th February, 1821. Those who claimed under

the late *Samuel Chase* leased this property to *Basil Williamson*, who had the possession thereof when this bill was filed. The plaintiff claims one-third of this property as her dower; and she also claims a remuneration for the rents and profits of her third part from the death of her husband; and thereupon prays, that dower may be assigned to her; that the property may be sold for the payment of the rents and profits due to her; or that the future accruing rents to which the defendants are entitled, may be sequestered or placed in the hands of a receiver to be paid over to her until she is satisfied; and generally, that she may have such relief as is suited to the nature of her case.

The defendants *Barney* and wife, and *Cole* and wife, submit the case to the justice of the court. The defendant *Williamson* declares, that he is totally ignorant of the plaintiff's pretensions; and, therefore, leaves her to sustain them; but admits, that he holds as tenant under some of the other defendants. The defendant *Richard M. Chase* disclaims all interest in the matter in controversy. And *Hester-Ann*, *Matilda*, and *Frances T. Chase*, the three infant children of the late *Thomas Chase*, who have been made defendants as heirs of their father, who was a defendant and died after he had answered, state their ignorance of the whole affair, and pray to have their interests protected. But, their father does not seem to have had any interest in this property, which could have been affected by the plaintiff's claim; or if he had, it will be fully considered and disposed of in passing upon the defence which he jointly made, before his death, with three others of his co-defendants. Consequently, all these defendants may be safely passed by without any further notice, and the case may be at once disencumbered of every thing in relation to them.

The defendants *Samuel Chase*, *Matilda Ridgely*, and *Ann Chase*, have put in a joint and several plea and answer. They alone claim the property, called the Fountain Inn. They contest the plaintiff's claim altogether and in every shape. The whole opposition and the entire brunt of the controversy rest with them. They have couched their defence in the form of a plea and answer. The matter of their plea is extended over a wide surface in the foreground; and sets out all that mass of particulars of which their defence is composed. The matter of this plea amounts to this, that the plaintiff filed a bill against them on the 5th of July 1813, and another on the 14th of February 1814, in both of which

she claimed dower in this same property; that the matter of those suits was finally settled, and thus they were dismissed; and therefore, they plead those suits, the agreement, and the dismissal of them in bar of the claim now made by the plaintiff.

But these defendants, not content with resting their case upon the matter thus set out by way of plea, have gone on to repeat the whole of the same matter, and to rely upon it by way of answer. The bill always calls for an answer from the defendant as to all the matters of fact therein set forth. But one of the peculiar and proper offices of a plea is to present such a defence as shews, that the defendant cannot be compelled to make, or may well be excused from making such an answer as the bill calls for; and therefore, upon the ground of inconsistency, the defendant cannot be permitted, by way of plea, to aver, that he ought not to be compelled to answer, as called upon in relation to any particular matter, and at the same time to put his defence, as to the same matter, into the form of such an answer as the bill calls for. Hence if a defendant answers to any thing as to which he has pleaded, he thereby overrules his plea; for his plea is only why he should not answer, so that if he answers he waives his plea to the same matter. The same principle is equally applicable to demurring and answering, and to demurring and pleading to the same part.(*h*) The plea of these defendants must, therefore, be totally rejected; as being overruled by the subsequent answer, covering exactly the same matter; and I have the less hesitation in thus striking it out, because it is evident, from the answer, that nothing at all necessary to the sound merits of the defence will be lost.

But in the answer itself, of these defendants, there are matters which may be safely banished from it without in the least enfeebling the force of the defence. That which is related of the matter of the bill, filed on the 17th of February, 1813, by this plaintiff and *John P. Paca;* what is said about the letter, and the conveyances from *John E. Howard* to the late *Samuel Chase;* what is related of the late *Samuel Chase's* intentions to make advancements of property to his children; and the allegations respecting the rough draft of his will, with some other particulars of less note, cannot certainly be at all material to the defence. I shall, therefore, lay them aside, as in no way necessary to the present matter in controversy.

(*h*) Gilb. For. Rom. 58; Mitf. Tr. 320; Beams' Pl. Equ. 39.

The defence rests on the following grounds:—*first*, that the plaintiff has heretofore sued for dower in this property, and by the final termination of those suits her claim, if she ever had any, has been fully released or barred; *secondly*, that if she has not been thus solemnly barred, yet she is not in law dowable of this property, because her late husband never had a fee simple estate therein, but held only a mere equitable interest, as a mortgagee to secure the payment of money lent by him; *thirdly*, supposing these objections removed, that still her claim can be carried no further back than to the 26th of February, 1821, when the lease to *Bryden* and her relinquishment of dower up to that period expired; and *lastly*, supposing her claim to be valid, that yet the two-thirds of this property, belonging to these defendants, can neither be sold nor sequestered as a means of satisfying the amount of the rents and profits, which may be decreed to her. These are the great points of defence. The nature and validity of each of which must now be carefully considered and determined.

With regard to the first point. The defendants *Samuel*, *Matilda*, and *Ann* claim this property, called the Fountain Inn, and allege, that the plaintiff has released, or is barred of dower therein, by the agreement, and the manner in which two suits, heretofore instituted in this court, to recover dower in the same property, have been finally adjusted and determined. If this allegation be well founded, there is an end of the case; since it cannot be necessary to inquire, whether the plaintiff had been previously thereto dowable of this property; and much less to determine the extent to which she might have been entitled to recover.

This plaintiff, with *John P. Paca*, her trustee, filed a bill on the 17th of February, 1813, in this court, against the representatives of the late *Samuel Chase*, to recover a certain amount of money alleged to be due to her. After which she filed one bill on the 5th of July, 1813, and another on the 14th of February, 1814, in which she presented herself as the widow of the late *Samuel Chase*, claiming dower in every parcel (the Fountain Inn, among the rest) of the real estate of which her late husband had been seized during their marriage, against his heirs, and all others, whom she had found in possession of any part thereof. To these suits the defendants appeared and answered; when the parties came to an agreement, designated in this case as the exhibit S. M., by which the matters in dispute in all three of them were to be adjusted or withdrawn. This written agreement is without date;

but the letter of *Stephen* and *Magruder*, dated on the 28th of September, 1816, speaks of propositions for compromising these suits as then depending. And the Chancellor remarks, at the foot of his decree in the first cause, dated the 17th of July 1817, that "it is passed as being considered within the meaning of the agreement signed by the parties." Consequently, this agreement S. M. must have been executed some time between those dates.

By the agreement S. M., a decree was to be passed in the first case in favour of the plaintiff for the amount demanded, with costs; which was done accordingly on the 17th of July, 1817. As to the second and third, or the dower cases, as they may be called, the instrument of writing declares, that "It is also further agreed, that in the two last of the above causes, decrees shall pass giving the complainant dower in the following tracts, pieces or parcels of land, to wit,"—going on to specify certain property, without the least allusion to the Fountain Inn; and then proceeds in these words: "Provided, it shall appear to the satisfaction of the Chancellor, by the exhibition of title papers or otherwise, as he may order, that the said *Hannah K. Chase* hath a right to dower in the same. And it is further agreed, that a compensation in money shall be paid to the complainant by the defendants, for and in lieu of her dower in the property abovementioned, and that such compensation shall be fixed by the Chancellor, upon evidence offered to him of the value of the said respective pieces or parcels of land, by the actual sales, where sales are to be made by the trustees as aforesaid, and for want of sales, by depositions shewing such value; to be taken before some justice of the peace for Baltimore county, residing in the city of Baltimore, by either party, upon giving three days' notice. And it is further agreed, that the said bills be dismissed as to all the property in the proceedings mentioned, not specified and included in this agreement. And that the complainant pay the costs."

The motives, which induced the parties to enter into this agreement, are not expressed in the instrument itself; nor can they be clearly inferred from any thing that is said in it. The first suit, instituted by *Hannah K. Chase* and *John P. Paca*, seems to have no sort of connexion with the subsequent dower cases. According to the agreement, the plaintiffs, in that case, were to have a decree for all they asked; and then it proceeds to speak of the dower cases, without making any allusion whatever to that case. Therefore, while confining our contemplation to the agreement alone,

the first case, and every thing relative to it, may be wholly laid aside.

Looking at this agreement, in relation to the dower cases alone, it seems to be wholly gratuitous, without any valuable consideration whatever moving from either party. The plaintiff was to recover nothing to which she could not produce a clear subsisting title. She was to be endowed of certain specified property, *provided* she satisfied the court, that she was entitled to dower therein. It is neither said nor insinuated, that she was to be endowed of any one parcel of land, in consideration of her relinquishing dower in any other parcel. In short, she was to be endowed of no land in which she was not legally entitled to dower; and to no greater amount than its exact value, to be determined by the court. The plaintiff agreed to dismiss her bills claiming dower, as to all the property not included in the agreement, and to pay all costs. This concluding branch of the agreement is perfectly in character with every other part of it. Like the rest, it is merely gratuitous; and, consequently, according to every principle of equity, it cannot be construed into a release of any right, beyond the express and irrisistible sense of the terms used.

The words of the agreement are, that "the bills be *dismissed.*" Suppose this agreement had been followed out by a formal decree, then the court must have dealt with the matter in the manner in which it was submitted; that is, it must have determined upon the rights of the parties as to all the property specified in the agreement; and as to the residue, it could only have ordered, in pursuance of the agreement, "*that the bills be dismissed with costs.*"(*i*) To make a decree a good and available bar, in any subsequent suit, it is not sufficient merely to shew, that the bill was dismissed; but the party must go further, and shew, that the matter of the bill was *res judicata;* that there was an absolute determination by the court, that the party had no title.(*j*) But the Chancellor could not, in those cases, have given any determination in relation to the plaintiff's title to dower in the Fountain Inn; because he was deprived of the means of doing so by the agreement, which simply directed, that those suits as to that property should be dismissed with costs. No decree which the Chancellor could have pronounced in pursuance of that agreement, could have given to it any additional extent

(*i*) Rowe *v.* Wood, 1 Jac. & Walk. 345.—(*j*) Brandlyn *v.* Ord, 1 Atk. 571; Mitf. Tr. 238; 2 Mad. Cha. 312; Beam. Pl. Eq. 218.

or force as a bar against the present plaintiff. There was, however, no formal decree ever passed in those cases; they were closed on the 19th of July, 1819, by the short docket entry "agreed," evidently in reference to this written agreement.

The question, therefore, recurs upon the agreement alone. It is stipulated, that the bills be dismissed as to the property not included in the agreement. It is a contract to abandon those *suits;* but it is not a relinquishment of the *right* claimed by them. The two things are substantially different; and that difference, it appears from the whole phraseology of the agreement, was in the then contemplation of the parties. Much is directed to be done, to facilitate the speedy progress of the suit; the usual formal and tedious mode of collecting testimony, necessary to a correct decision upon the rights of the parties, is dispensed with; and the suits are to be brought to a close in a summary way; but no right is ceded, no title is relinquished by either party. On the contrary, we are told, that the plaintiff is to recover; *provided*, and only provided the Chancellor shall so determine. The defendants concede to the plaintiff nothing, absolutely nothing. They, therefore, can have no equitable ground to claim from her an abandonment of her rights. The agreement, that the bills be dismissed must be considered as referring to a mere voluntary dismissal by the plaintiff herself, which would leave her rights and interests untouched and unimpaired in all respects whatever.

This agreement is not so explicit as it might, and perhaps ought to have been; but, after mature consideration, I find enough in it to bring my mind satisfactorily to the conclusion, that it cannot be deemed a relinquishment of the plaintiff's right of dower in the Fountain Inn. The solicitors on both sides have contended, that it is entirely unambiguous; and yet they have had recourse to the proofs and circumstances to aid the interpretation respectively contended for. A few remarks upon those circumstances and proofs seem therefore to be required.

To the lease from the late husband of the plaintiff to *Bryden*, of the Fountain Inn, she made a formal relinquishment of dower. This lease did not expire until the 26th of February, 1821, some years after the commencement of the two former dower suits. This was an embarrassing circumstance. These defendants admit it to have been so considered at that time; for they say, in their answer, that, as they have been advised, the plaintiff's acknowledgment of the lease to *Bryden* did not operate as a bar of her

dower; but merely as a suspension of execution during the term; and that the right to dower might have been determined in those suits. But, these defendants, not satisfied with telling us of the advice they had obtained, as to this apparent difficulty, have drawn forth that which was given to the plaintiff upon the same subject.

The policy of the law does not permit a solicitor to divulge the secrets of his client. Such confidential communications are not to be revealed at any period of time, either before or after the suit has been brought to an end, or in any other suit; for, as to all such matters his mouth is shut for ever.(*k*) A solicitor may refuse to act further for his client, but he cannot go over to the opposite party.(*l*) But this obligation of secrecy is the privilege of the client, not the incompetency of the solicitor. In this case, the defendants have called on the plaintiff's solicitors to tell of their advice and opinions to their client; and the plaintiff has not objected. She has waived her privilege. Hence her solicitors are legal and competent witnesses. It appears by their depositions, that their recollection of facts and occurrences which happened at the time of the agreement, about the two former dower suits, is very obscure and general. But there is no ambiguity in their letter of the 28th of September, 1816.

Their advice respecting this estate called the Fountain Inn, is remarkable; it is expressed in these words:—"We are of opinion you have no title of dower during *Bryden's* lease; having relinquished your dower therein during said lease, which will expire in 1821. Whether upon the termination of said lease, you will be entitled to dower, is a question of some difficulty; and, perhaps, can only be solved by some further proof in point of fact relative to the nature and effect of the contract between the late Judge *Chase* and *Bryden*." And, after some further observations as to this contract, they say:—"We do not think, that this difficulty should prevent a settlement as to the residue of the property in which dower is asserted; in relation to which, we have reason to believe, no opposition will be made to your claim. If, before the lapse of five years, the question, as to *Bryden's* property, should not be settled, the question between you will be narrowed down to a single point, in the adjustment of which we suppose no great

(*k*) Vaillant *v.* Dodemead, 2 Atk. 524; Sandford *v.* Remington, 2 Ves. jun. 189; Richards *v.* Jackson, 18 Ves. 472; Parkhurst *v.* Lowten, 3 Mad. 121; Arnot *v.* Biscoe, 1 Ves. 95; Wilson *v.* Rastall, 4 T. R. 753; Bul. N. P. 284.—(*l*) Cholmondeley *v.* Clinton, 19 Ves. 272.

difficulty can take place." After the receipt of this advice the plaintiff signed the agreement S. M.

These circumstances and this letter fortify the construction I have put upon the agreement S. M. The plaintiff's agreeing to dismiss her bills, as to the Fountain Inn, and also to submit to the payment of costs, is satisfactorily accounted for. It thus clearly appears, that so far from relinquishing any right, she then merely withdrew from before the tribunal, with a fixed resolution to return to the contest at a more convenient season; unencumbered with matters which might be then disposed of and finally adjusted.

It is, therefore, my opinion, that neither the institution and termination of those suits, nor the agreement S. M., can in any manner whatever be considered as a bar, or release of the right now asserted by this plaintiff.

The next question is, whether the late husband of the plaintiff had an estate in the Fountain Inn during their marriage, of which she is dowable. It is admitted on all hands, that the legal estate in fee simple of this property was originally in *Harry D. Gough;* all who are any way concerned in this controversy deduce their interests from him; and, consequently, the only question now is, whether *James Clarke*, to whom *Gough* conveyed, and the late *Samuel Chase*, to whom *Clarke* conveyed, held as mortgagees from *Bryden*, or any one else; or whether *Clarke*, and from him *Chase*, obtained an absolute indefeasible legal estate in fee simple, or only an equitable interest.

It appears, by the recitals in the conveyance, dated the 4th of February, 1806, from *James Clarke* to the late *Samuel Chase*, that *Harry D. Gough*, who was seized of an estate in fee simple in the land covered by the Fountain Inn, had agreed to sell it to *Daniel Grant*, and gave his bond with a condition to convey it to him when he paid the purchase money. *Grant* sold his interest, and assigned this bond to *James Bryden;* and *James Clarke* and *John Smith* became *Bryden's* sureties for the payment of the balance of the purchase money due to *Gough*, and also for the sum which he had agreed to pay *Grant*. *Bryden* paid and satisfied *Grant* in full. Then *Clarke*, it is said, at the request of *Bryden*, paid *Gough* $7,216 42, the amount then due to him; who thereupon conveyed the fee to *Clarke;* and *Bryden* delivered to *Gough* his bond. After which, at the request of *Bryden*, the late *Samuel Chase* paid *Clarke* the sum he had paid to *Gough*, and also paid to *Bryden* the sum of $10,283 58; amounting altogether to the sum of $17,500.

Whereupon *Clarke* conveyed to *Chase* an absolute estate in fee simple. On the twenty-sixth of the same month, in which *Chase* had obtained this conveyance, he leased the property to *Bryden* for the term of fifteen years, reserving an annual rent of $2000; to which lease *Chase's* wife, the present plaintiff, added her relinquishment of dower in the usual form. And on the same day on which the lease bears date, *Chase* executed his bond to *Bryden*, stipulating, in the condition, that if *Bryden* should pay him the sum of $17,500, at the expiration of fifteen years from that time, and not before, or within one year thereafter, and not afterwards, that then he, *Chase*, would reconvey the property called the Fountain Inn to *Bryden*. After which, on the 2d of April, 1811, *Samuel Chase*, *jun'r*, one of these defendants, proposed to purchase this property of the late *Samuel Chase*, and in that proposal he speaks of the dower of the present plaintiff as a then vested legal right. This proposal was matured, and the property was conveyed by the late *Samuel Chase* to this defendant *Samuel Chase*, *jun'r*, in trust, or out of which he was to make provision for *Matilda Ridgely* and *Ann Chase*, two others of these defendants, and daughters of the late *Samuel Chase*.

It has been urged, that *Bryden* always understood this contract between the late *Samuel Chase* and himself to be nothing more than a mortgage; and that he instituted a suit in this court to set aside this absolute conveyance from *Clarke* to *Chase*, and to be let in to redeem. It has also been urged, that *Samuel Chase*, one of the present defendants, under a conviction that *Bryden* had a good and available right, purchased his interest. This may be all true; but surely the assertions of *Bryden*, however solemn or formal, or the mere acts or allegations of any of these defendants, not responsive to the bill, cannot be seriously regarded as a part of the legal and pertinent proofs in the case. Therefore, all these sayings and doings of *Bryden*, and of these defendants, must be entirely put aside as foreign to the subject now under consideration. There is then, in fact, no proof whatever, in relation to the nature of the contract between the late *Samuel Chase* and *James Bryden*, other than that afforded by these several deeds and instruments of writing themselves.

The various contracts, made at different times, by the several parties concerned, from *Gough* to the late *Samuel Chase*, exhibit this matter in an obscure and circuitous form, from which it may be, in some degree, relieved and shortened, without enfeebling the pretensions of either of the present parties, by regarding *Gough*,

Grant, *Clarke*, and *Bryden*, as the persons who held the entire estate, legal and equitable; and as the grantors in fee simple to the late *Samuel Chase*, for the consideration of $17,500. It is clear from the indenture of the 4th of February, 1806, that the late *Samuel Chase* obtained the whole and entire interest of all those persons, as well at law as in equity; and became thereby vested with an absolute estate in fee simple. Because, it appears by the recitals of that deed, that he had paid *Gough* and *Clarke* for the legal interest they held; and that he had also paid for the equitable interest of *Grant* and *Bryden*. From this deed alone, therefore, there can be no doubt, that the late *Samuel Chase* held an estate in fee simple, of which this plaintiff is dowable.

But the bond of the 26th of February, 1806, it is said, shows that the previous contract, of the 4th of the same month, according to the true intention of the parties, is only to be regarded as a mortgage; that it is not, as it purports to be upon its face, an absolute sale; but a mere security for the loan of money from the late *Samuel Chase* to *James Bryden*. It is true, the court should, in cases of this nature, look into the various contemporaneous agreements and dealings between the parties to ascertain what was their design, and the real nature of their contract.(*m*)

This case is, however, susceptible of being still further simplified and reduced. Let it be supposed, that *Bryden* had obtained the entire estate in fee simple from *Gough*, *Grant*, and *Clarke;* and, being so seized, that he alone was the grantor by the deed of the 4th of February. Then, let this bond, of the 26th of February, be considered together with or even as a part of that deed. The whole will read as an absolute sale, with nothing more than a condition for a re-purchase.

That this whole transaction, from whatever point of view it may be contemplated, can only be considered as an absolute sale, with a condition or covenant for a re-purchase, is manifest; because, it wants all the usual badges and characteristics of a mortgage. The money paid was, so far as appears, a fair price for the absolute purchase of such property; liable to much injury, requiring frequent repairs, and of fluctuating fashion and profits. Although *Chase* was not put into actual possession, yet *Bryden* leased from him, and held as his tenant. *Chase* received the rents and profits for his own use and benefit, and gave no account of them whatever.

(*m*) Sevier v. Greenway, 19 Ves. 412.

The chief value of this lot of land within the city of Baltimore, consisted in there being a large edifice erected upon it, which was occupied and used as a tavern: the loss of which, if destroyed by fire or otherwise, must have been borne by *Chase;* as it was held at his risk entirely.(*n*) There was nothing of that reciprocity so essentially necessary to constitute a mortgage. It is as essential that the one party should have it in his power, at some specified time, to compel the re-payment of the money, or to foreclose, as that the other should have it in his power to redeem. But, although *Bryden* might re-purchase for a stipulated sum at any time, during the sixteenth year after the date of the contract, yet *Chase* could not compel *Bryden* to pay any sum of money, at any time: *Chase* took no bond, or other collateral security from *Bryden;* nor is there any clause in any deed or conveyance, by which *Bryden* covenants or promises to pay *Chase* any sum of money. If the edifices had been destroyed, or the property had been ever so much reduced in value, *Chase* could have recovered nothing of *Bryden.* The contract is, therefore, utterly destitute of that mutuality always incident and necessarily belonging to a mortgage of any description.(*o*) But it appears, by the lease from *Chase* to *Bryden*, that this contract was, notwithstanding the bond, regarded as an absolute sale with a condition to re-purchase, and nothing more, by *Bryden* himself; for, he obtained and accepted a relinquishment of the right of dower of the wife of *Chase.* And it appears, from the proposals of *Samuel Chase*, one of these defendants, made on the 2d of April, 1811, that he also, then considered the contract as an absolute sale; for, he speaks of this plaintiff's then existing right of dower.

Upon the whole I am satisfied, that the late *Samuel Chase* was seized of an estate in fee simple in this property, of which the plaintiff, as his widow, is entitled to dower.

The next inquiry is, as to the extent of the recovery. Some of the authorities cited in reference to this branch of the case, related exclusively to the modern creatures of equity, called terms attendant upon the inheritance, which were not clearly recognised and defined in England until about the year 1670; and which have, so far as I can learn, never been introduced into this State, and are not likely to become fashionable among us. The equitable principles

(*n*) Co. Litt. 205, n. 1; Pow. Mort. 125, note P., and 138, note T.—(*o*) Tasburgh *v.* Echlin, Pow. Mort. 133; Thornborough *v.* Baker, 3 Swan. 631; Goodman *v.* Grierson, 2 Bal. & Bea. 279; Robertson *v.* Campbell, 2 Call. 421; Roberts *v.* Cocke, 1 Rand. 121.

in relation to these attendant terms, and the distinctions between them and legal terms in gross are entirely foreign from the present subject of consideration.

The lease from *Chase* to *Bryden* created a legal term in gross; and the rent reserved was an annual rent service. It is to this particular estate which the acknowledgment of the plaintiff refers. Suppose the late *Samuel Chase* had, previously to his marriage with the plaintiff, executed such a lease as this to *Bryden*. How would the plaintiff's claim of dower have been affected? It is clear, that a woman may be endowed of a rent service, rent charge, or rent seck. And, to use the words of the most accurate and profound of the English lawyers, "If the husband maketh a lease for years, reserving rent, and taketh wife, the husband dieth, the wife shall be endowed of the third part of the reversion by metes and bounds, together with the third part of the rent, and execution shall not cease during the years."(*p*) But if a particular estate for years be carved out of the inheritance, prior to the marriage, without the reservation of any rent whatever, then the widow can only recover her dower in the *reversion*, with a *cesset executio* during the term.(*q*) Hence it is certain, that, if this lease to *Bryden* had been made prior to the marriage, this widow would have been entitled to dower in the reversion, and in the rent immediately from the death of her husband.

The question then resolves itself into this: has the plaintiff's acknowledgment placed her in the same, or in a different situation from that she would have been in, had the lease to *Bryden* been made before her marriage? At one time, an opinion prevailed, that a *feme covert* could, in no way, bar or divest herself of her right of dower during her coverture. But, we are told, there can now be no question, that if the husband and wife levy a fine, the wife is barred for two reasons. *First*, Because the intermarriage and seisin are the fundamental causes of dower, and the death of the husband but as an execution thereof. *Secondly*, Because all those who have estate, or title, or *claim*, join in the assurance; and, therefore, in such case, if the husband and wife have made a lease rendering rent to the husband and his heirs, and afterwards the wife recovers dower, she shall hold it charged with the term; since it is a maxim, that all lands in fee simple may be charged in one way or other. But in such case, as where the land had been

(*p*) Co. Litt. 32. a.—(*q*) Pow. Mort. 687, note P.

thus charged before marriage, the wife would be dowable of the reversion and the rent;(*r*) so, if the husband and wife join in levying a fine to effect a mortgage, and nothing more, the wife's interest will be affected to the extent of the mortgage, and no further. She will have a right to redeem, and may call on the personal representatives of her deceased husband to discharge the mortgage debt out of his personal estate, so as to free her dower from all incumbrance.(*s*)

It may be regarded as a rule, that the interest of a *feme covert*, who joins in levying a fine, will be affected no further than according to the express intention of the fine. Hence, if its only object be to improve the title and give additional security to the lessee for years, or mortgagee, her rights will be impaired in no respect not necessary for that purpose, and she will be allowed to take her dower in like manner as if such lease or mortgage had been made before the marriage.

To prevent the creation of perpetuities, it is laid down as a general rule of law in England, that all lands may be charged or aliened in one way or other. The mode of conveyance must be adapted to the nature of the case; but, if the proper method be pursued, the alienation may, in most cases, be made effectual whatever may be the nature of the estate or interest of the grantor. If it be an estate tail, it may be barred by a fine or common recovery; or if, by reason of the peculiar nature of the estate, a fine cannot be levied, or a common recovery had, then a deed or common conveyance will be sufficient.(*t*) And in all cases, a *feme covert*, if she be of full age, may alien her fee simple estate, or relinquish her claim to dower by means of a fine. Fines were always binding upon married women; though it was thought proper to make them liable to examination by a statute of the year 1290;(*u*) but it was not merely by the examination that the fine had its efficacy.(*v*) The mode of conveyance by fine is couched in the form of a suit upon an agreement; as to which the wife is examined by the judges of the court apart from her husband, so that it may appear to them, that she perfectly understands what she is about to do, and freely gives her consent to it; and if they doubt of her age, they may examine her upon oath, before they pronounce

(*r*) Co. Litt. 343; Lampet's case, 10 Co. 49.—(*s*) Pow. Mort. 677, note D. (*t*) Otway *v.* Hudson, 2 Vern. 584; Moore *v.* Moore, 2 Ves. 601; Everall *v.* Smalley, 1 Wils. 26.—(*u*) 18 Ed. 1, stat. 4; Kilt. Rep. 146.—(*v*) Richards *v.* Chambers, 10 Ves. 587.

their judgment.(*w*) Upon which a peculiar efficacy is ascribed to the agreement, so that it is not open to objections which would be fatal to an agreement of a married woman, authenticated in any other way: for there is no other form in which a court of common law can, with the consent of a *feme covert*, give validity to her agreement concerning her estate; and there are few cases in which even a court of equity can, with her consent, enable her to dispose of her property, real or personal.(*x*) This solemn and embarrassing mode, by which alone married women are enabled to dispose of their rights and interests in real estate may have been, and may yet be well suited to the circumstances and state of society in England; but it is obviously unsuited to the state of things in our country, and much more so formerly, when land titles were so frequently and informally transferred from one to another as to have been, for some time, among the most current instruments of traffic among the colonists;(*y*) than now when real estates have become better settled and more permanently held.

In Pennsylvania, and many of the other colonies, it had become usual for married women to dispose of their lands or to relinquish their right of dower by a common deed, or instrument of writing executed and authenticated as if they had been sole; which conveyances were afterwards confirmed, and the custom of making such deeds, with their consent, taken on a private examination, was adopted by legislative enactments.(*z*) In Virginia, where the mode of conveyance by fine was never in use, following, as it would seem, a local custom of Wales, or of London,(*a*) it had become usual for married women, in order to effect a valid conveyance of their lands, or relinquishment of their dower, to make an acknowledgment of the deed in a private examination before the general or county court,(*b*) which mode of conveyance was afterwards confirmed and adopted by the colonial legislature.(*c*)

In Maryland, although it is said, that lands were sometimes conveyed by fine passed in the provincial or county court,(*d*) or by common recovery;(*e*) yet it would seem, that there had been many instances of conveyances made, in the form of mere common contracts, with intention to bind the interests of married women as if

(*w*) 2 Inst. 515.—(*x*) Richards *v.* Chambers, 10 Ves. 580; Ritchie *v.* Broadbent, 2 Jac. & Walk. 456.—(*y*) Land H. A. 77.—(*z*) Davey *v.* Turner, 1 Dal. 11; Lloyd *v.* Taylor, 1 Dal. 17; Watson *v.* Bailey, 1 Binn. 470; Jackson *v.* Gilchrist, 15 John. 89. (*a*) Dyer, 363, b. Crui. Dig. tit. Dower, c. 4, s. 15.—(*b*) 1 Virg. Stat. 145, note. (*c*) 2 Virg. Stat. 317.—(*d*) Hammond's Lessee *v.* Brice, 1 H. & McH. 323.—(*e*) 1766, ch. 21.

they had been sole, which were afterwards ratified and confirmed.(*f*) But it appears, that the provincial legislature of Maryland at a very early period made provision for quieting possessions and establishing the manner of conveying lands by deed acknowledged and recorded;(*g*) and prescribed that form of private acknowledgment of conveyances of real estate and relinquishment of dower from *femes covert*,(*h*) which has been reenacted and continued in force from that time forward by the now existing law.(*i*) Since the passage of which law the method of conveyance by fine has been disused, and indeed may be now considered as having sunk into total oblivion.(*j*)

(*f*) 1671, ch. 6; 1694, ch. 11; Land H. A. 214.—(*g*) 1663, ch. 7.—(*h*) 1674, ch. 2, s. 5; 1692, ch. 30, s. 5; 1699, ch. 42, s. 6.—(*i*) 1715, ch. 47. Rhea *v.* Rhenner, 1 Peters, 105.—(*j*) Hammond's Lessee *v.* Brice, 1 H. & McH. 323; Kilt. Rep. 146.

The recording of deeds and conveyances of land in Maryland may, at first view, seem to have been intended altogether and exclusively for the benefit of landholders; but the lord proprietary had also a considerable interest in it; because by the tenure on which he granted his lands, he reserved to himself a small annual quit rent, and a fine for every *alienation;* and the recording of deeds and wills afforded the means of ascertaining and collecting that branch of his revenue.—*Land H. A.* 233, 244, 259, 266. *Land Office Records, Journal of the Board of Revenue.* The first General Assembly of the Republic resorted to the same sources of information for the purpose of correctly taxing real estate, by directing, that the then late receivers of the quit rents for each county should make out lists, from their last debt-books, of the names and quantity of acres of every tract of land within the county, and to whom the same belonged or ought to be charged, and to deliver such lists to the commissioners of the tax for the county.—*February*, 1777, *ch.* 21, *s.* 22. Since then the acts which have been passed for the assessment of taxes upon property have required the register of the land office, and the clerks of courts, by whom deeds are required to be recorded, to furnish the commissioners of the tax with lists of alienations of lands thus shewn by their records, in order to ascertain to whom the tax should be charged, 1803, *ch.* 92, *s.* 37 & 38, &c.

The fines for alienation, or the casualties of the feudal law were taxes upon the transference of land both from the dead to the living, and from the living to the living. In ancient times they constituted, in every part of Europe, one of the principal branches of the revenue of the crown; which, like all such taxes, fell most heavily upon the necessitous or the poor; and, so far as they diminished the capital value of the property so taxed, tended to diminish the funds destined for the maintenance of productive labour.—*Smith's W. Nations, b.* 5, *c.* 2, *app. to art.* 1 *&* 2. The fines payable to the lord proprietary on every such transfer here also, as it appears, constituted a considerable portion of his revenue.—*Cassell* v. *Carroll*, 11 *Wheat.* 134.

The registration of mortgages, and in general of all rights upon immovable property, says an enlightened philosopher, as it gives great security to both creditors and purchasers, is extremely advantageous to the public.—*Smith's W. Nations, b.* 5, *c.* 2, *app. to art.* 1 *&* 2. Yet an eminent English lawyer has delivered it as his settled conviction, that a general registry, throughout England, would entail a great and certain expense on property for a very uncertain benefit. Because a general registry wantonly exposes the concerns of all mankind; and by the negligence of an agent, a

The acknowledgment of a *feme covert* to a deed, as prescribed by the act of assembly, it is obvious, was introduced as a substitute for a fine; and although a deed of bargain and sale, so acknowledged, will not, like a fine, as relates to the interests of third persons, work a discontinuance,(*k*) yet as regards the *feme covert* herself it as effectually, and to a like extent, passes her interest as a fine.(*l*) Hence an acknowledgment of a *feme covert*, made according to the act of assembly, like that made on levying a fine, can operate only so far, and no farther, than the deed itself, to which it is annexed, would operate, according to its nature, supposing it to have been made by the husband before the marriage, or by herself alone while sole.

It is, therefore, my opinion, that the acknowledgment of this plaintiff to the lease to *Bryden*, can only be construed as an improvement and further security to *Bryden's* title; and that, on the death of *Samuel Chase*, the plaintiff became immediately entitled to dower in the reversion of the Fountain Inn; and also in the rent reserved by that lease, without delay of execution during the term.

At law, the widow can recover damages or mesne profits for the detention of her dower only from the time it was actually demanded of the heir. And if the jury fail to assess damages for the detention, she can recover no costs; because costs are given only where damages are recovered.(*l*) But in equity it is otherwise; here it is the course of the court to assign her dower, and universally to give her an account of the rents and profits from the death of her husband. But where the heir throws no difficulties in her way, and admits her claim, she has no costs.(*m*) In this case, however, it appears, that every possible opposition has been made to this plaintiff's claim.(*n*) As to the value of the rents and profits, one-third of the rent reserved by the lease to *Bryden*, and no more, can be recovered during that term. After that time the actual

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purchaser or mortgagee may lose the estate, if the seller or mortgagor fraudulently sell or mortgage to another person whose deed is the first registered, and questions upon the priority of registered deeds often lead to litigation.—*Sugden's Letters on Sales*, &c. 47.

(*k*) Lawrence *v.* Heister, 3 H. & J. 377; Mayson's Lessee *v.* Sexton, 1 H. & McH. 275; Nicholson's Lessee *v.* Hemsley, 3 H. & McH. 409.—(*l*) Colegate D. Owing's case, post 000.—(*l*) William *v.* Gwyn, 2 Saund. 45, note; Pow. Mort. 718, note P; 2 Harr. Ent. 698.—(*m*) Curtis *v.* Curtis, 2 Bro. C. C. 632; Dormer *v.* Fortesque, 3 Atk. 130.—(*n*) Lucas *v.* Calcraft, 1 Bro. C. C. 134; Worgan *v.* Ryder, 1 Ves. & Bea. 20; 2 Mad. Chan. 564.

value must be the criterion. For, as it is said, if a wife be entitled to dower of land worth no more than five dollars per acre, and the heir by his industry or by building thereon makes it worth fifty dollars per acre; the widow shall have her dower according to the improved value. So, on the other hand, if the property be impaired, she can recover only according to the reduced value.(*o*) But the heir is entitled to no allowance for meliorations and improvements. The account of the rents and profits must be taken according to these principles. Interest must be allowed on the rent from the time it became due or was actually paid by the tenant, as it shall appear.(*p*)

There is yet one other branch of this case to be disposed of. The plaintiff prays, that the two-thirds of this property, not covered by her claim, may be sequestered or sold to satisfy the amount which may be awarded to her for rents and profits. I have been referred to no authority which would warrant a sequestration or sale as prayed; nor do I know, that there is any such authority to be found. Perhaps the power to sequester might have been thought to rest upon principles similar to those on which I founded the order appointing a receiver. The cases are, however, widely different. The sole object of appointing a receiver is to take care of the subject about which the parties are contending, and to prevent it from being wasted or lost. Such an appointment involves a decision upon no right; and cannot affect any point in controversy. But a sequestration, or sale, makes a temporary or a total disposition of the property, which can be done in no instance where the matter is not put in issue by the nature of the case, and a sequestration or sale is not expressly authorized. From the nature of the decree, here called for, the title of the defendants and their enjoyment of the two-thirds must be left undisturbed. It is their property. But, like any other property belonging to them, it will be subject to seizure, and sale under a *fieri facias* upon a decree commanding them to pay the plaintiff a specified sum of money, should they fail to comply. These prayers of the plaintiff must, therefore, be rejected.

There may be some difficulty in assigning the plaintiff dower in this property, owing to its peculiar nature. It is represented to be a large and valuable edifice, chiefly or altogether occupied as a

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(*o*) Co. Litt. 32, a.—(*p*) Tew *v.* Winterton, 1 Ves. jun. 451; Baird *v.* Bland, 5 Mun. 492; Davis *v.* Walsh, 2 H. & J. 344.

tavern. And it may turn out, upon inquiry, that it is incapable of being advantageously occupied in any other way; or perhaps of being divided at all. A rent may be given for equality of partition or in lieu of dower; which in its nature will be distrainable of common right.(*q*) I shall therefore, in the decree appointing the

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(*q*) Co. Litt. 144, 169; Turney *v.* Sturges, Dyer, 91; Dacre *v.* Gorges, 2 Sim. & Stu. 454; Com. Dig. tit. Annuity, (A. 3.); Warfield *v.* Warfield, 5 H. & J. 459.

Corse *v.* Polk.—The bill, filed on the 10th of December, 1818, states, that Alexander Stewart, and Mary his wife, being seized of certain lands, in her right, by deed conveyed them to Warner Razin to hold in trust for the use of them and the survivor for life, remainder to their children; that they are both dead, leaving only three children the parties to this suit; that the defendants are infants. Prayer for a partition. The defendants Polk and wife made answer admitting the statement of the bill. Rebecca R. Stewart answered by guardian, also admitting the allegations of the bill. The trustee does not appear to have been made a party. On the 1st of April, 1819, an interlocutory decree to make partition was passed, and the usual commission was issued, and a return made thereon.

16*th July*, 1819.—Kilty, *Chancellor*.—Ordered that the return made by the commissioners under the interlocutory decree for partition be confirmed, unless cause shewn before the 1st day of September next; provided a copy of this order be served on the defendant, James Polk, and on the guardian of Rebecca R. Stewart, before the 15th day of August next.

The commissioners returned, that they had divided the lands as described, &c. and then say, "they do further certify and return, award and adjudge, that the said Unit Corse and Mary his wife, pay to Rebecca R. Stewart, the sum of one thousand and ninety-seven dollars and thirty-three and a third cents, and to James Polk and Ann Maria his wife, the sum of five hundred and thirty dollars and eighty-three and a third cents." The defendants filed objections to this return, because among other things, "the said lands are capable of a specific equal division, and ought to have been so divided among the respective claimants according to quantity and quality."

15*th February*, 1821.—Kilty, *Chancellor*.—An order was passed during the present term, to wit, on the 25th of January, 1821, for a hearing of the objections filed by James Polk at March term next on notice; but the parties having since submitted them on notes in writing, they are now taken up for consideration.

I do not view the commission or any part of the proceedings as being ordered under the act to direct descents; but under the provisions of the common law as to partition, which is exercised by the Chancery Court, and is recognised by the act of 1794, *ch.* 60. Of course a sale could be ordered as suggested by the counsel of J. Polk, and a partition must in some way be made.

The parties have not had any further survey or taken proof under the order of December term 1819; the counsel for J. Polk relying on his objections, that the commissioners had not complied with their directions.

The objections drawn from the terms of the commission are not considered valid. An equal division may exist where the difference in quantity or quality is made up in money. The assignment of the several parts, although it has not been expressed in the commission, is included in the power to divide. It is conformable to the practice where the commissioners think proper so to do; and if they omit it, the assignment to each party is made by the court by lot, for which however there is no express authority.

commissioners to lay off and assign the plaintiff's dower in this property, leave sufficient latitude for them to report specially all circumstances; and also in the alternative. So that the final decree may be adjusted to suit the case, after the parties have been heard. As to the rents and profits the case will be sent to the auditor.

Decreed, that the said *Hannah K. Chase*, the plaintiff, is entitled to dower in all that messuage, tenement, and lot of land in the proceedings mentioned, called the Fountain Inn. And to the end that this court may be enabled to make a just assignment to the plaintiff of her dower in the aforesaid messuage, lands and tenements, it is ordered, that a commission issue to *Benjamin C. Ridgate*, *William Magruder*, *James Mosher*, and *Robert C. Long*, of the city of Baltimore, authorizing them or any three of them to go upon, walk over, survey, lay off and designate one-third part of the said premises as and for the dower of the said plaintiff in the same; and that the said commissioners be directed in the commission to make out a plot and certificate exhibiting an accurate description of the third part or dower so by them laid out. And if they shall be of opinion, that the said messuage and lot of land cannot be divided, in the manner which they shall so specify, without injury to the same, and disadvantage to the parties, they shall express their reasons for such opinion, state all circumstances they may deem material, and proceed to designate and describe specially in what other manner the said plaintiff may be endowed of the said property, without any, or with less injury thereto, and

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On this view of the case, I should deem it proper to confirm the return if an examination of the plot had been made according to the rule of the court; that not being the case, the decision will be postponed till March term, the order of December term 1819 being still in force as to the survey and procuring testimony in support of the objections against them.

The plots having on motion been delivered as ordered, to the solicitor of the party, were laid before the examiner general, and after having been revised by him, were again returned to the court. After which the commissioners made and returned a valuation of the lands, of which they had made partition, but the valuation is not mentioned in the final decree.

26*th January*, 1822.—Johnson, *Chancellor*.—Decreed, that the partition so made, &c. &c. "And for the purpose of making an equal division in value, it is further adjudged, ordered and decreed, that Unit Corse and wife, pay to Rebecca R. Stewart, the sum of one thousand and ninety-seven dollars, thirty-three and one-third cents, and to James Polk and wife, the sum of five hundred and thirty dollars, and eighty-three and one-third cents, which said sums of money are adjudged and declared to be a lien on lot number one in this decree mentioned. Each party to these proceedings to bear an equal proportion of the costs of these proceedings."

without any, or with less disadvantage to all concerned. And the said commissioners shall make return of their proceedings to this court, as soon as may be, subject to its further order upon the same. And to the said commission there shall be annexed the usual oath of office.

And it is further *decreed*, that the defendants, *Samuel Chase*, *Matilda Ridgely*, and *Ann Chase*, pay unto the said *Hannah K. Chase*, the plaintiff, one-third part of the rent reserved by the lease to the said *James Bryden*, from the 19th of April 1811, (the day of the death of the said late *Samuel Chase*,) until the expiration of the said lease; and further, that the said defendants pay unto the said plaintiff one-third part of the rents and profits of the said property, in the proceedings mentioned, from the termination of the said lease until the time of the said plaintiff's being put into possession of her dower in the said premises.

And for the purpose of having an account taken of the said rents and profits, it is further *decreed*, that this case be and the same is hereby referred to the auditor, with directions to state an account or accounts, from the proceedings and proofs in the case, or from such other testimony as may be laid before him by the parties. And it is further *ordered*, that each party on giving to the other, or her, or their solicitor three days' notice, as usual, be and they are hereby authorized to have testimony taken before the commissioners appointed to take testimony in the city of Baltimore, in relation to the rents and profits of the premises, to be used before the auditor and the court; provided it be taken and filed with the register on or before the first day of June next.

A commission was issued as directed by this decree, and the commissioners in their return, filed on the 29th June, 1827, state a mode in which it was practicable to have the dower specifically assigned; but they say, they are unanimous in the opinion, derived from a patient, careful and cautious examination, that the location would tend to the manifest injury and disadvantage of the parties; the property having been expressly constructed for a tavern, &c. &c. But the defendants having appealed from this decree, the Court of Appeals on the 25th July, 1828, dismissed the bill with costs.

LINGAN *v.* HENDERSON.

The plaintiff by petition, stating on oath the circumstances, may, before the coming in of the answer, obtain a commission to take the testimony *de bene esse* of an aged and infirm witness.

An order of publication, warning an absent defendant to appear, as the substitute for a *subpœna*, is granted as of course; because a plaintiff so proceeds at his peril: and it must go against a wife as well as her husband, or she will not be bound.

If the statute of frauds be not specially relied upon, and the whole contract be not expressly denied in pleading, the party can have no advantage of the statute, by objecting to the proofs, or in any other way.

Verbal proof may be received to corroborate and supply omissions in a written contract, or to contradict the usual receipt endorsed on a conveyance, which is considered as evidence of the lowest order.

The plaintiff's case must be fully shown by his bill; its defects cannot be supplied from the other proceedings; because it is upon the case so stated alone, that the court can grant relief.

The special prayer must be for such relief as can be given; but under the general prayer, that relief will be given which is best suited to the case, though not orally asked for.

The plaintiff may present his case in the alternative; provided the alternatives are both of them such as are cognizable by a court of equity; and are not so framed as to allow the plaintiff to elude any rule of court.

There is a variety of cases at common law as well as in equity, in which a plaintiff may obtain relief against some one or more of the defendants, although he may totally fail against all the others; but where one of two or more defendants makes a defence which so effectually goes to the whole as to show, that the plaintiff had no cause of suit, nor any foundation for a legal complaint, he can have no relief even against the defendant as to whom the bill had been taken *pro confesso*.

In general, the answer of one defendant cannot be evidence against another; the exceptions to this rule.

In what cases a complainant or co-defendant may be examined as a witness in the case.

The answer of the wife obligatory upon her.

The policy of the statute of limitations, its nature, in what way, and how far applied in equity.

Where the statute of limitations is relied upon by one in bar of a contract by which he, with others, is charged to have been bound, it cannot be taken out of the statute by any acknowledgment which would not be equivalent to a renewment of such contract by all.

More precision is required in a plea than in a bill.

A plea of the act of limitations of *three* years is not applicable to an equitable lien, which can only be barred by a lapse of *twenty* years.

This bill was filed on the 29th of November, 1821, by *Janet Lingan*, *William B. Randolph* and *Sarah* his wife, *George Lingan*, and *Elias B. Caldwell* and *Anne* his wife, against *Richard Henderson*, *Sarah Henderson*, *Janet L. Henderson*, and *David English* and *Lydia* his wife.

The bill states, that *James M. Lingan*, in May, 1807, by deed, duly recorded, conveyed to *John Henderson*, his brother-in-law, a

parcel of land lying in Montgomery county, being about four hundred and twenty acres; that some time after *John Henderson* executed and delivered to *James M. Lingan* a written paper, which is in these words: "Received of *James M. Lingan* a deed for four hundred and twenty acres of land lying in Montgomery county, which is to be accounted for by me, *John Henderson*—June 10th, 1807." Which paper, as the complainants are advised, is an acknowledgment that no purchase money was paid at the time for the land, and that it was an engagement to pay the purchase money for the same if there was a sale, or if not, to re-convey it. The bill further states, that the plaintiffs have reason to believe, that a sale was made, that the price to be paid for the land was about thirteen dollars thirty-three and a third cents per acre, without interest till the expiration of twelve months after the day of sale; but of this, or of the terms of the contract, if any, the plaintiffs have not been able to discover any positive proof; but that if there was no sale, there could be no consideration for the deed, and the bargainee held the same in trust and for the use of the bargainor and his heirs. That *James M. Lingan* and *John Henderson* lived several years after the deed was executed, and *Henderson* retained the possession and took the profits of the land; and the plaintiffs believe it will be in their power to prove, that *Henderson* acknowledged, several years after the execution of the deed, that he had not paid for the land; that he was not able to pay for it; and insisted, that *James M. Lingan* was, by the contract, to take it back in case he, *Henderson*, was unable to pay for it. The bill further states, that some years afterwards *John Henderson* departed this life intestate, without having paid any part of the purchase money for the land; that administration upon his estate had been granted to his widow, the defendant *Lydia*, who has since intermarried with the defendant *David*; that the administratrix has possessed herself of the personal assets of the estate, sufficient to pay all just debts against it; and that *John Henderson* left three infant children, the defendants *Richard Henderson*, *Sarah Henderson*, and *Janet Lingan Henderson*, who are his heirs at law. That *James M. Lingan* is dead intestate, leaving the plaintiff *Janet* his widow, to whom administration upon his estate had been granted, and three children, the plaintiffs *Sarah*, *George*, and *Anne*. And that the administratrix of *John Henderson* disputes the claim of the representatives of said *Lingan* against *Henderson's* personal estate; and, his children being infants, no adjustment can be had with them.

Whereupon it is prayed, that the administratrix of *Henderson* may be compelled to pay the amount of the purchase money for the land, with interest; or if the sale should not be admitted or proved, that the heirs of *Henderson* may be compelled to re-convey the land to such of the plaintiffs as are entitled thereto; and that the plaintiffs may have such further and other relief as to the court shall seem meet and consistent with equity. And forasmuch as the defendants were all of them non-residents, the plaintiffs prayed an order of publication, which was passed accordingly, directing the defendants to be warned to appear on or before the 29th day of May then next.

The plaintiffs, by their bill, filed on the 15th of December, 1821, in this case, alleged, that *Henry Waring*, of Washington county, in the District of Columbia, was the only person by whom they expected to be able to prove their claim; that he was then advanced in life, and if deprived of his testimony, they were apprehensive that they would not be able to establish their claim. They, therefore, prayed, that a commission might be issued to perpetuate his testimony, and that it might be issued to *James Dunlop*, jun'r, *John Marbury*, *J. J. Stull*, and *Joseph Brewer*, and for such other relief, &c. Annexed to this bill there was an affidavit of the truth of the facts stated in it, made before an assistant judge of the Circuit Court of the United States for the District of Columbia; and a certificate of the Secretary of State, that he was at the time an assistant judge.

15*th December*, 1821.—Johnson, *Chancellor*.—Issue the commission as prayed.(*a*)

The testimony of the witness was taken and returned accordingly; but as the testimony of this same witness was afterwards regularly taken, it is unnecessary here to take any further notice of this examination *de bene esse*.

The defendants *David English* and wife, on the 8th of May, 1822, filed their answer, which sets out in these words: "The answer of *David English*, and *Lydia English* his wife, formerly *Lydia Henderson*, administratrix of *John Henderson*, to the bill of complaint of *Janet Lingan* and others. The said defendant saving

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(*a*) Rymer *v.* Dulany—1737.—Petition for a commission *de bene esse*, stating that the petitioners, the plaintiffs, were in want of the testimony of Abraham Cream, of Frederick county, who was a material witness for the petitioners in the said cause, and who was about eighty years of age, and sick and impotent. Granted.—*Chan. Pro. lib. S. H. H. lett. C. fol.* 296.

and reserving to herself now, and at all times hereafter, all and all manner of benefit and advantage of exceptions to the manifold uncertainties and imperfections in the complainant's said bill of complaint contained, for answer thereunto, or to so much thereof as materially concerns these defendants, to make answer unto the said defendant *Lydia English*, answereth and saith, that she admits," that *James M. Lingan*, by deed bearing date on the 8th of May, 1807, conveyed to *John Henderson* the tract of land as mentioned by the plaintiffs; that *John Henderson* died intestate leaving the heirs, and that administration was granted on his estate as stated by the plaintiffs; but, that no final account hath been passed, by which she can ascertain whether the personal assets of the intestate are sufficient to pay all just debts against his estate. She further alleges, that about the first of December, 1798, *James M. Lingan*, being possessed of a grist and saw-mill, and other improvements, and of land adjacent, agreed with *John Henderson* to carry on the same in partnership; which *John Henderson* carried on from that time until some time about the year 1807; by which considerable profits were made, which came to the use of *James M. Lingan* in his lifetime; that *Richard Henderson*, the father of *John Henderson*, died, leaving five children, *Janet*, the wife of *James M. Lingan*, *John Henderson*, *Sarah Henderson*, *Arrianna Sims*, and *Ann Henderson;* and was at the time of his death possessed of a large real and personal estate; upon which *James M. Lingan* and *John Henderson* took out letters of administration of the personal estate jointly; that *James M. Lingan* had possession, under those letters, of all the intestate's personal estate; collected the whole of the debts, and enjoyed the benefit of the commissions allowed for administering the estate, which amounted to a considerable sum. The defendant *Lydia* further answering, says, that *John Henderson* has never yet received any part of what he was entitled to from *Richard Henderson's* estate, but that the same has remained in the hands of *James M. Lingan*. She admits such an instrument of writing as that of the 10th of June, 1807, mentioned in the bill, was executed by *John Henderson;* but she understood, that the land was to be accounted for in the general settlement of accounts between them at the price for which they had agreed; that in the settlement of the account was to be included, not only the concerns of the partnership in which they were concerned, but also the accounts of the administration of the estate of *Richard Henderson*, and the proportionable share of that estate to which *John Henderson* was entitled.

But there has been no final settlement of accounts between *James M. Lingan* and *John Henderson*. The partnership between them was dissolved in 1807, and the books of the concern delivered to *James M. Lingan*, as surviving partner, after the death of *John Henderson* in 1809, for the purpose of collecting the debts of the partnership; that *John Henderson* received none of the profits of the partnership; and she thinks it may possibly be shewn, that *James M. Lingan* was considerably in debt to the concern. The defendant *Lydia* further answering, says, that she does not know what price was agreed on between *Lingan* and *Henderson* for the land mentioned in the deed; but admits, that *John Henderson* had the possession and enjoyed the profits of it to the time of his death, which happened on the 27th of January, 1809; that she does not know of *Henderson's* having acknowledged, after the execution of the deed, that he had not paid for the land; that he was unable to pay for it, and that he insisted that *Lingan* was, by the contract, to take it back in case *Henderson* was unable to pay for it. But she admits that *John Henderson* and *James M. Lingan* died as stated in the bill, and that the plaintiff's claim is disputed at law by her as administratrix. The defendant *David English* saith, that he hath no knowledge of the matters charged in the bill, and therefore can neither admit or deny them.

It appears by the affidavit subjoined to this answer, that it was sworn to before a justice of the peace of Washington county, in the District of Columbia, by both of these defendants, *David English* and *Lydia* his wife; and added thereto is a certificate by the clerk of that county, that the person before whom the oath was taken, was at the time duly commissioned and qualified as a justice of the peace. After the coming in of this answer, the plaintiffs filed a certificate of the clerk of the editors of the National Intelligencer, annexed to a printed copy of the order of publication, stating that it had been published as required. The plaintiffs then by petition prayed, that a commission might be issued to the persons therein named by them to take testimony, &c.

29th July, 1822.—Johnson, *Chancellor*.—Ordered, that a commission issue to the persons named as commissioners, unless the defendants shall name and strike commissioners, on or before the 20th day of August next.

No one having appeared to name and strike on behalf of the defendants, a commission was issued as directed, on the 8th of

October, 1822, to the commissioners named by the plaintiffs. In pursuance of this commission the parties were notified, &c.; when *Henry Waring*, a witness, was produced and sworn on the part of the plaintiffs. In answer to the first interrogatory, he says, that he knew *James M. Lingan* twenty-five or thirty years before his death, and *John Henderson* upwards of twenty years.

2*d Interr.* Were you or were you not acquainted with the circumstances relative to the sale of a tract of land described as a part of a tract of land called Zoar, situate in Montgomery county, in the State of Maryland, by General *James M. Lingan* to *John Henderson*;—if yea, state the same particularly, whether the said tract of land was paid for by the said *Henderson*, what was the price for which the same was sold, and all the circumstances within your knowledge relative to the same?

Answer. That a short time after Mr. *John Henderson* purchased of General *James M. Lingan* the farm he, Mr. *Henderson*, lately resided on, this deponent was going to Georgetown, and at the request of Mr. *Henderson*, mentioned to General *Lingan* that Mr. *Henderson* expected to pay no interest for two years from the purchase. General *Lingan* observed, that it was not so; one year clear of interest was as much as his circumstances would justify, or he would willingly give Mr. *Henderson* two years. This deponent then observed to General *Lingan*, there was, he believed, a misunderstanding which had better be fully explained. On this deponent's return, he mentioned to Mr. *Henderson* what had passed between General *Lingan* and himself. About twelve or eighteen months, as well as deponent can recollect, before the death of Mr. *Henderson*, this deponent was at Mr. *Henderson's* house; this deponent and Mr. *Henderson* were alone, and Mr. *Henderson* observed to this deponent, that he should not be able to pay General *Lingan* for the land; observing, that the produce of the farm was small; that General *Lingan* had agreed to take it back, if he found he, Mr. *Henderson*, could not pay for it; and that he, said *Henderson*, would certainly move to the back country, (Cumberland this deponent believes was the place mentioned,) but it was disagreeable to Mrs. *Henderson's* connexions to leave them. This deponent understood from Mr. *Henderson* he was to give General *Lingan* about thirteen dollars and one-third of a dollar per acre, or that the land cost him about that sum per acre.

3*d Interr.* Were you or were you not intimate with Mr. *Henderson*, and had frequent conversations with him on the subject of

the purchase of said land; and whether did such conversations, and your intimacy, continue down to the time of Mr. *Henderson's* death; if yea, state whether in all such conversations relative to said purchase, you understood from Mr. *Henderson*, the said land was or was not paid for; or whether the said *John Henderson* considered himself in debt for the purchase money of said land?

Answer. That he lived a near neighbour to Mr. *Henderson*, and was very intimate with him, meeting him generally two or three times a week, when this deponent was in the neighbourhood; that Mr. *Henderson* was in the habit of making full and free communications with this deponent relative to his affairs; they had frequent conversations relative to said purchase. This deponent always understood from Mr. *Henderson*, that said land was not paid for, and that he, Mr. *Henderson*, would not be able to pay for said land. This deponent never understood from Mr. *Henderson*, that he claimed any thing from General *Lingan*, except what he, General *Lingan*, might receive from his, Mr. *Henderson's*, father's estate.

4*th Interr.* Did you or did you not hear Mr. *Henderson* state any thing as coming to him from the mill, which he and General *Lingan* held in partnership; if yea, state the same, and when the partnership in said mill was at an end?

Answer. That he understood the partnership in the mill ceased, when General *Lingan* moved to Montgomery county, which was about the time Mr. *Henderson* went to live on the farm purchased of General *Lingan*. The proportion of the profits to which Mr. *Henderson* was entitled as partner in the mill, this deponent does not know; he is under the impression, from his own observation, and to the best of his recollection from conversations, that Mr. *Henderson* told him the mill had made little or nothing, and that little or no profits accrued from the partnership.

5*th Interr.* Did you or did you not hear Mr. *Henderson* state, that he had purchased property for his own use, out of the partnership funds of the said mill; if yea, state what?

Answer. That he understood from Mr. *Henderson*, that he purchased a negro woman and child from the partnership fund.

6*th Interr.* Were you acquainted with the handwriting of Mr. *Henderson*, and have you seen him write; if yea, state whether the paper now shewn to you marked A is in the handwriting, and the signature thereto in the handwriting of *John Henderson*?

Answer. That the paper marked A, (the writing of the 10th June 1807, set forth in the bill,) now shown to him is in the hand-

writing of *John Henderson*, and that he has seen the said *John Henderson* write, and knows his handwriting.

7*th Interr.* Do you or do you not know whether Mr. *Henderson* drew his support for himself and family during his residence at the mill, and during the continuance of the partnership abovementioned from the partnership property?

Answer. That he believes he did; except, that he has heard Mr. and Mrs. *Henderson* say, that the father and mother of Mrs. *Henderson* had frequently sent them supplies of provisions.

1*st Cross Interr., by defendant David English.* At the conversations mentioned by you, (in your answer to the second interrogatory of the complainants,) with Mr. *Henderson* about eighteen months before his death, was not Mrs. *Henderson*, now Mrs. *English*, present, and did not said conversation grow out of your advising Mr. *Henderson* to purchase an adjoining estate then for sale?

Answer. That he does not recollect or believe, that Mrs. *Henderson*, now Mrs. *English*, was present at the time of said conversation, or that it grew out of circumstances as mentioned in said interrogatory.

8*th Interr. on the part of the plaintiffs.* Were the conversations you had with Mr. *Henderson* (mentioned in your answers to previous interrogatories,) respecting the interest of the purchase money for the land, and his, Mr. *Henderson's* inability to pay for the same, previous to the date of the deed?

Answer. That he does not know the date of the deed; the conversation respecting the interest was previous to Mr. *Henderson's* removing on the land; and that respecting his inability to pay for the land after his removal on the same, and about eighteen months before his death.

9*th Interr.* Was or was not Mr. *Henderson* put in possession of the farm at the time of the purchase, and has he or his heirs continued in possession ever since?

Answer. That the farm called Zoar was included with the mill in the partnership, and Mr. *Henderson* was in possession of both mill and farm in the same right previous to the purchase; after the purchase he cultivated the farm in his own right, and sometime afterwards removed on the farm with his family, and he or his representatives have continued in possession ever since.

2*d Cross Interr. on the part of the defendants.* Do you know any thing of *John Henderson's* being employed for five or six years by General *Lingan* at his mill, on Seneca, before any partnership

was entered into; was he of expensive habits; or do you suppose he saved part of his salary?

Answer. That he understood from Mr. *Henderson*, that he was at the mill as agent for General *Lingan* several years, but how long this deponent does not know; that Mr. *Henderson* was very frugal in his dress, and in all respects a very frugal prudent man; that this deponent has understood, that his salary while at the mill was at least one hundred pounds per year.

3*d Cross Interr.* Were you acquainted with the terms of the purchase of the land?

Answer. That he was not present when the contract for the land was made; that he acquired his knowledge of the purchase of the land from both Mr. *Henderson* and General *Lingan;* that Mr. *Henderson* told this deponent he had given General *Lingan* a memorandum of the purchase of the land, which this deponent understood was the paper marked A before referred to; and that Mr. *Henderson* and General *Lingan* both told this deponent they had done their business very loosely; that they had great confidence in each other; that the deponent understood from Mr. *Henderson*, that General *Lingan* had given him a deed for the property, and this memorandum was the only paper he had given as evidence of the purchase.

4*th Cross Interr.* Do you know how General *Lingan* came to make a deed, and have dower relinquished; is it not usual in Maryland to give bonds of conveyance when land is sold on credit?

Answer. That he did hear some reason given for making the deed, but he can't say now what that reason was; it was, this deponent understood, to answer some good purpose to Mr. *Henderson;* it is usual to give bonds of conveyance where land is sold in Maryland on credit.

5*th Cross Interr.* Have you any knowledge of General *Lingan's* drawing supplies for his family provisions, his hay and feed for his horses from the mill and farm during the eight years of the partnership, from 1798 to 1807?

Answer. That General *Lingan* drew hay, whiskey, flour, poultry, and perhaps other things that he wanted, from the mill and farm during the partnership; that this deponent does not know how long the partnership continued; that wheat was purchased at the mill; and that this deponent has been told by Mr. *Henderson*, that General *Lingan* furnished funds to pay for it.

6*th Cross Interr.* From your knowledge of the land when Mr. *Henderson* moved on it, could there be any reasonable prospect of ever paying for it from its products?

Answer. That he cannot say from his knowledge of the land whether there was or was not a reasonable prospect, when Mr. *Henderson* moved on it, of paying for it from its products; he thought the land was good land for that part of the country; it required improvement before it could be cultivated to advantage.

After the examination of the witness was thus closed, the solicitor of the defendants filed with the commissioners the following objection: "On the part of the defendants so much of Mr. *Waring's* deposition as goes to prove, by the parol declarations of *John Henderson* deceased, any promise or acknowledgment concerning the purchase money of the land in question; especially in so far as it goes to contradict or explain the receipt of *J. M. Lingan* on the deed for the purchase money; or the complainant's exhibit A, referred to in said deposition, (purporting to be said *John Henderson's* receipt for the deed, dated June 10th, 1807,) is objected to as inadmissible, as well under the particular provisions of the statute of frauds, as the general rules of evidence, by which evidence to contradict or vary a written instrument is excluded."

The commission, with this testimony and these objections, were returned and filed on the 12th of July, 1824. Some time after which the plaintiffs by their petition stated, that they had by mistake alleged in their bill, that all the defendants were non-residents, when in truth the defendant *Richard Henderson* always has been, and is now a resident of Montgomery county in this State. Whereupon they asked leave so to amend their bill as to pray process of *subpœna* against him.

16*th January*, 1826.—Bland, *Chancellor.*—An order of publication, such as that prayed for by the bill of these plaintiffs, is allowed by the acts of assembly only as a substitute for a *subpœna* in certain specified cases, which are thus made exceptions to the general rule, which requires, that the regular process of the court should be prayed for and issued against all who are to be called in as parties and defendants to the suit. Hence it must appear upon the face of the bill, that the case is of such a nature as to authorize an order of publication warning a *resident* defendant to appear, or it must be expressly stated in the bill, that the parties therein named *do not reside* within the State, so as thereby to lay a proper foundation for praying for an order of publication warning them to

appear and answer. Where a husband and wife, who neither of them reside within the State, are proposed to be made defendants, it is necessary that she should be warned by the order as well as her husband, otherwise her interests cannot be bound.(*a*) In all cases the granting of such an order of publication is almost as much a matter of course as the issuing of a *subpœna;* because it is conceived that the plaintiff proceeds upon it at his peril, for if the case be such, or the defendant be not in fact a non-resident, so as to authorize such an order, any decree which the plaintiff may thus obtain must be considered as utterly void in point of fact.(*b*) These plaintiffs having discovered their mistake, do well therefore to have their bill amended in this respect. Let the amendment be made as prayed.

After which, on the 17th of November, 1826, the defendant *Richard Henderson* alone filed the following plea:

"This defendant by protestation to all the discoveries and relief, in and by the said bill sought from or prayed against this defendant and others, doth plead in bar, and for plea saith, that by an act of assembly made and passed at April session in the year one thousand seven hundred and fifteen, entitled, "An act for limitation of certain actions, for avoiding suits at law," it was amongst other things enacted, that all actions of trespass *quare clausum fregit;* all actions of trespass, detinue, *sur trover*, or replevin for taking away goods or chattels; all actions of account, contract, debt, book, or upon the case, other than such accounts as concern the trade or merchandize between merchant and merchant, their factors and servants which are not residents within this province; all actions of debt for lending, or contracts without specialty; all actions of debt for arrearages of rent; all actions of assault, menance, battery, wounding and imprisonment, or any of them, shall be sued or brought by any person or persons within this province, at any time after the end of this present session of assembly, shall be commenced or sued within the time and limitation hereafter expressed and not after; that is to say, the said actions of account, and the said actions upon the case, upon simple contract, book debt, or account, and the said actions for debt, detinue, and replevin for goods and chattels, and the said actions for tres-

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(*a*) Martin *v.* Russell, MS., 22d December, 1797.—(*b*) Carew *v.* Johnston, 2 Scho. & Lefr. 280.

pass *quare clausum fregit*, within three years ensuing the cause of such action, and not after; and the said actions on the case for words, and actions of trespass of assault, battery, wounding, and imprisonment, or any of them, within one year from the time of the cause of such action accruing and not after. And this defendant saith, that neither he this defendant, nor to his knowledge or belief the said *John Henderson* deceased, this defendant's father, did at any time within *three* years before exhibiting the said bill or serving, or suing out process against the defendant to appear to and answer the same, promise or agree to come to any account for, or to pay, or any ways satisfy the said complainants, or the said *James M. Lingan* in the said bill of complaint mentioned, any sum or sums of money, for or by any reason or matters, transactions or things in the complainant's said bill of complaint mentioned, charged, or alleged. All which matters and things this defendant doth aver to be true, and is ready and willing to maintain and prove as this honourable court shall award; and he doth plead the same in bar to the whole of the said bill, and doth humbly demand the judgment of this honourable court whether he this defendant ought to be compelled to make any further or other answer to the said bill."

To this plea there was subjoined an affidavit of its truth; but there was no answer in its support denying the admissions and acknowledgments charged in the bill. The plaintiffs put in a general replication to this plea, and the case was thus, without the defendants *Sarah Henderson* and *Janet L. Henderson* having appeared, set down for final hearing, and the solicitors of the parties having been fully heard, the proceedings were submitted to the Chancellor for his final determination upon the whole case, as before set forth.

4*th May*, 1827.—Bland, *Chancellor*.—Having come to the conclusion, that the land must be decreed to be sold for the payment of the purchase money, it is therefore ordered that this case be and the same is hereby referred to the auditor to make a statement of the purchase money now due.

On the next day the auditor reported, that he had found due from the estate of *John Henderson* deceased, to the estate of *James M. Lingan* deceased, the sum of $11,924 14, with interest on $5573 33, part thereof, from that time until paid.

8*th May*, 1827.—Bland, *Chancellor*.—In whatever way this case may be considered, it is necessary, in the outset, to dispose of

the objections which the defendants have thought proper to make, and have returned with the commission. It is objected, that the parol proof is inadmissible; first, under the peculiar provisions of the statute of frauds; and in the next place, on the ground, that by the general rules of evidence it should be excluded.

The first of these objections is not made to the competency of the witness, or to the regularity of the manner in which his deposition has been taken, but to the grade of testimony by which the plaintiffs have thus proposed to sustain their case. The statute to which this objection refers, allows a party who may be charged by a contract, like that upon which these plaintiffs rely, to shield himself from imposition and fraud, by requiring of his opponent some unerring *written* evidence of such contract. Consequently, in all cases to which the statute of frauds extends, where the defendant, in his pleadings, rests upon his right to have the contract, by which he is so proposed to be charged, authenticated by written evidence, the plaintiff cannot obtain relief, unless he sustains his case by such proof; mere parol or verbal testimony, however strong, will not be sufficient. But the statute of frauds was intended for the benefit and protection of a party against whom a claim might be made. It does no more than extend to such a person a privilege which he may altogether waive, and put his defence upon the merits of the case, as they may be shown by legal proof of any grade or description whatever.(*b*) And therefore it has been finally established, that if a defendant makes default, or makes his defence without expressly denying the whole contract, or in any other form, without relying upon the statute of frauds, he thereby tacitly waives its benefit, and cannot be permitted to take advantage of it afterwards or at the final hearing; so that if the contract should be sufficiently sustained by parol proof, the court will grant relief, although written evidence of no part of such contract may have been produced.(*c*) But these defendants have, none of them, in any form of pleading expressly denied the whole contract, and relied upon the statute of frauds. This objection cannot be considered as forming any part of those allegations upon which an issue between these parties has been or might have been joined. It is nothing more than a sort of exception to the testimony which has been improperly foisted in with the return of the commission,

(*b*) Buxton *v.* Marden, 1 T. R. 81.—(*c*) Cooth *v.* Jackson, 6 Ves. 37; Rowe *v.* Teed, 15 Ves. 375; Jones *v.* Slubey, 5 H. & J. 383.

and can be considered at most as standing only as if made in argument at the final hearing. But, as such, it is wholly inadmissible in any way; and particularly for the purpose of excluding any proof merely because of the inferiority of its grade, or because of its not being such *written* evidence as might have been required had the statute of frauds been specially relied upon.

In the next place, apart from the statute of frauds, the admission of this testimony is objected to on the ground, that it cannot be received in so far as it goes to contradict or explain the receipt of *J. M. Lingan* on the deed for the purchase money, or the memorandum of the 10th of June, 1807. The evidence given by this witness is, however, introduced, not to contradict or vary any part of the entire contract, but to supply deficiencies and to prevent fraud, by shewing that of which the deed of conveyance says nothing, and to corroborate, explain and fortify that of which the memorandum of the 10th of June speaks ambiguously. Taken in this point of view, this parol proof may well and consistently stand with the deed, and so much of the whole contract, as has been actually reduced to writing.(*d*) A receipt, not under seal, although it be strong, is not, in all cases, conclusive evidence of the fact;(*e*) but a receipt for the purchase money, such as this, endorsed by *J. M. Lingan*, the grantor, for the sum of five dollars, the nominal consideration, on the back of the deed, looking to the usage, in such cases, of making an absolute conveyance, of which such a receipt is a mere formal part, leaving the purchase money in fact unpaid, is considered, in equity at least, as being, in itself, evidence of the lowest order.(*f*) This second objection, as well as the first, must therefore be totally overruled.

It has been long and well established as a rule of law and equity, that the plaintiff can only obtain relief upon the strength of his own title as it existed at the time of instituting his suit, and not on the weakness of the title of his adversary, or the imbecility of his defence.(*g*) In general, if the facts stated in the bill are not in substance sufficient to entitle the complainant to the relief prayed,

(*d*) Joynes *v.* Statham, 3 Atk. 389; Blagden *v.* Bradbear, 12 Ves. 471; Hartopp *v.* Hartopp, 17 Ves. 191; Co. Litt. 222 b. n. 2; Pow. Mort. 200.—(*e*) Trisler *v.* Williamson, 4 H. & McH. 219; Hughes *v* O'Donnell. 2 H. & J. 324; 4 Stark. Ev. 1272. (*f*) O'Neale *v.* Lodge, 3 H. & McH. 433; Dixon *v.* Swiggett, 1 H. & J. 252; Higdon *v.* Thomas, 1 H. & G. 145; Knight *v.* Pechey, Dick. 327; Sug. Ven. & Pur. 386; Pow. Mort. 1062; Irvine *v.* Campbell, 6 Bin. 118; Duval *v.* Bibb, 4 Hen. & Mun. 113.—(*g*) Mitf. Pl. 141, 154, 232; Barfield *v.* Kelly, 4 Russ. 355; Watts *v.* Lindsey, 7 Wheat. 161.

he cannot resort to the answer of the defendant, the proof taken in the case, or any extraneous matter to supply the defect,(*h*) for no evidence can be received which is not applicable to some one of the material allegations of the bill;(*i*) but in order to remove any doubt as to what was intended by any indirect or ambiguous charge in it, its interrogating part, as well as its prayers for relief, may be material and proper to be considered for that purpose.(*j*)

The principal facts of which this case is composed, as set forth by the bill, and upon which alone the plaintiffs can have any claim to relief, are few and clear. They are these:—*James M. Lingan*, in May 1807, conveyed four hundred and twenty acres of land to *John Henderson*, in fee simple, who then, or at any time after, gave no valuable consideration for it, but having obtained possession, retained it until his death. Which land *Henderson* was to account for with *Lingan*, either by holding it in trust to be reconveyed to *Lingan*, or by holding it as a purchase, and paying for it at the rate of thirteen dollars and thirty-three and one-third cents per acre, with interest thereon commencing one year after the day of sale; but which purchase money has not been paid: of which facts the plaintiffs, having no positive proof, sought a discovery from the defendants. Some years after entering into this contract, *John Henderson* died intestate, leaving a considerable estate, which passed into the hands of the defendants as his legal representatives. *James M. Lingan* also thereafter died, leaving the plaintiffs his legal representatives. These are all the material facts stated in the bill.

After a plaintiff has thus distinctly set forth the facts of which his case is constituted, shewing it to be one which may properly be brought within the cognizance of a court of equity, he may then proceed, in his bill, to specify and ask for that kind of relief to which he thinks himself entitled. But if he expressly specifies the relief which he proposes to obtain, and prays for none other, either generally or specially; and the law will not allow the court to give relief of that kind, or the peculiar nature of his case will not warrant the granting of any such relief, then he cannot be relieved at all, unless he consents to amend or alter the prayer of

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(*h*) Hovenden *v.* Annesley, 2 Scho. & Lefr. 638; Kemp *v.* Pryor, 7 Ves. 240; Wright *v.* Plumptre, 3 Mad. 481; West *v.* Hall, 3 H. & J. 223.—(*i*) Chicot *v.* Lequesne, 2 Ves. 317; Gordon *v.* Gordon, 3 Swan. 472.—(*j*) Muckleston *v.* Brown, 6 Ves. 62; Saxton *v.* Davis, 18 Ves. 80.

his bill; for otherwise it must be dismissed. But, if the bill prays generally for such relief as is suited to the nature of the case, then, under such general prayer, the court may, regardless of, or without any special prayer, grant any such relief as may be allowed by law, in consistency with the nature of the case, whether the plaintiff asks for it orally or not;(*k*) and even although it should be more beneficial to him than that which he has specially prayed for;(*l*) of which the defendant is held to have been sufficiently notified, and is presumed to have been prepared to meet. For it is in many cases as much upon a defendant to look to what is prayed against him as to what is stated.(*m*)

These plaintiffs have by their bill made to the court three distinct prayers; *first*, that the administratrix of *John Henderson* be compelled to pay the purchase money, with interest; *secondly*, that the heirs of *John Henderson* reconvey the land; and *thirdly*, that they, the plaintiffs, may have such relief as to the court shall seem meet and consistent with equity. The two first of these prayers have been made to correspond with the alternatives of their case; either that the contract between *James M. Lingan* and *John Henderson* was to be considered as a sale, in which case the plaintiffs ask for the payment of the purchase money, or that, if it should be treated as a trust, then the heirs of *Henderson* should be ordered to reconvey the land to the heirs of *Lingan*. But as the peculiar nature of the case might suggest the propriety or necessity of granting relief in some other than either of those two specified modes, they have, in general terms, prayed for such relief as may be deemed proper. Consequently the plaintiffs may be relieved in one way or other, unless there should be found to be something in their bill to prevent it; or unless the claim of these plaintiffs should appear to have been in some way barred, or should be found to be not sufficiently authenticated by proof.

This case had its origin in a contract between *James M. Lingan* and *John Henderson*. Contemplating it therefore as an agreement between them alone, as now living, to be, as stated in the bill, either a conveyance of a tract of land in trust for a particular purpose, and then to be reconveyed; or as an actual sale of so much land to be paid for at a stipulated price, still it is one entire

(*k*) Beaumont *v.* Boultbee, 5 Ves. 495.—(*l*) Durant *v.* Durant, 1 Cox. 58. (*m*) Manaton *v.* Molesworth, 1 Eden, 26; Roche *v.* Morgell, 2 Scho. & Lefr. 729; Polk *v.* Clinton, 12 Ves. 65; Hiern *v.* Mill, 13 Ves. 119; Jones *v.* The Parishes of Montgomery, &c., 3 Swan, 208; Wilkinson *v.* Beal, 4 Mad. 408; Mitf. Pl. 38.

indivisible contract, utterly incapable of being broken up into distinct parts. The subject of it, taken in either alternative, may be divided. The land may be reconveyed in separate parcels, and the purchase money may be satisfied in many small payments; but, yet the one original contract covers all, and can exist only as a whole. The parties themselves may alter, relinquish, or receive satisfaction for the whole or any part of it, at their pleasure; but, to the court, it is a sacred unalterable whole, which must stand or fall together.

A plaintiff cannot be permitted to put his case in the alternative, so as to evade any of those settled rules which have been established by the court for the protection of its suitors from unreasonable vexation; as by giving to his bill such a disjunctive frame and alternative prayers, as, that it may be treated either as a bill of review, or as a bill of revivor and supplement, so as thereby to elude the protective operation of those rules by which a party is restrained from filing a bill of review at his pleasure.(*n*) And as a plaintiff must state a clear case of equitable jurisdiction, much less can he be permitted to call on the court to act upon a hypothetical bill praying relief, either at law or in equity; since he must distinctly determine for himself whether his case is at law or in equity.(*o*) But it is not irregular to bring a bill in which the case, taken in any way, being within the jurisdiction of a court of equity, is stated in the disjunctive or with two different aspects; so that if the plaintiff fails to sustain by his proof the one alternative, he may, by authenticating the other, obtain the relief he seeks.(*p*) Here, however, the alternative presented to the court is that of a conveyance in trust; or an absolute sale, with an incident equitable lien; so that, whether the plaintiffs sustain by their proof the one alternative or the other, they have, by their bill, presented a case which, without invading any rule, comes entirely within the cognizance of a court of equity.

But the originally contracting parties were both of them dead when this bill was filed. The plaintiffs are the legal representatives of *James M. Lingan*, deceased; and the defendants legally represent the late *John Henderson*. The rights, as well as the liabilities, under this contract, have thus passed into other hands and devolved

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(*n*) Perry *v.* Phelips, 17 Ves. 176.—(*o*) Edwards *v.* Edwards, Jac. Rep. 335. (*p*) Cresset *v.* Kettleby, 1 Vern. 219; Bennett *v.* Vade, 2 Atk. 325; Jones *v.* Jones, 3 Atk. 111.

upon other persons. The plaintiffs derive their right to the thing in controversy from *James M. Lingan;* they stand exactly in his place, and can all of them together claim nothing more than what might have been demanded by him. Any one of them may assign, or release his or her own undivided right, so far as it extends, without prejudice to the others; which transfer would, however, only operate so as to substitute the assignee for the assignor; and consequently this contract, as stated in the bill, is as entire and as utterly indivisible, as these plaintiffs have succeeded to it, as it was in the hands of *James M. Lingan*, the originally contracting party.

Then, on the other hand, the liability to which *John Henderson* was subject, by this contract, has devolved upon these defendants as his legal representatives. Considering it as a conveyance in trust, his administratrix is liable for the rents and profits, as for so much personalty, gathered by her intestate from the real estate which had been so conveyed: and his heirs are liable; because that real estate itself has, by operation of law, been cast upon them. In the other alternative, considering this contract as a bargain and sale, *Henderson's* administratrix is liable, as the holder of his personal estate, for the purchase money as one of his debts, for the payment of which, that part of his estate is primarily liable; and his heirs are liable, because the real estate itself, encumbered with an equitable lien for the payment of the purchase money, has passed into their hands; and also because of any other real estate of the intestate which may have descended to them, in case his personal estate may be found insufficient to pay his debts. But, it must be recollected, that the liability of each, and of all of these defendants is only in respect, and to the extent of the assets which may have come to their hands from the deceased contractor, who they thus far and no farther represent. But to the amount, that may be necessary to give to the plaintiffs complete and entire satisfaction, all the estate of *John Henderson* deceased in the hands of these defendants is liable, and no part of it can, by any act of any one, or all of them together, be disengaged from that liability without making to the plaintiffs a full and entire satisfaction. The court may, in some cases, like this, so marshal the bearing of the liability, provided it be attended with no delay or risk to the plaintiffs, as to place its burthen equally upon every part, or upon that portion of the estate by which it ought first to be borne; but as every part of the estate of the deceased is liable for the whole claim of the plaintiffs, no portion of it can be discharged until they have

been fully satisfied. Hence it is clear, that this contract as against these defendants is as absolutely indivisible and incapable of being broken up into separate parts by them, or in their favour by the court, as it was against *John Henderson* during his lifetime.

It appears, that, of these five defendants, *David English* and *Lydia* his wife, alone have put in such an answer as the bill calls for; that after they had done so, and the bill had been amended, the defendant *Richard Henderson* filed a plea of the statute of limitations, to which answer and plea the plaintiffs put in a general replication; and that the order of publication has been published as required, so that the bill may now be taken *pro confesso* against the absent defendants *Sarah Henderson* and *Janet L. Henderson.* In this situation the case has been brought before the court for a final decree upon the whole matter in controversy.

The defence of *Lydia English*, goes to the whole; because she admits, that such a contract as is stated in the bill was actually made, but avers, that it was satisfied; in others words she confesses and avoids the whole charge; and therefore, if her matter in avoidance be true, the plaintiffs can have no relief against her; because she would thus shew, that the whole claim had been actually satisfied. The defendant *David English* is passive; without expressly denying any thing, he admits nothing; and therefore, unless the plaintiffs establish their claim, as set forth, they can have no relief against him to any extent whatever. The defendant *Richard Henderson* rests his defence upon a plea of the statute of limitations. This defence also goes to the whole. It admits, that although a contract may have been made as alleged, yet it has been barred by the lapse of the prescribed length of time; and therefore, if this plea be properly applicable to the case and true, the plaintiffs can have no relief against this defendant, *Richard Henderson.* But the defendants, *Sarah Henderson* and *Janet L. Henderson*, having failed to answer, the bill may be taken *pro confesso* against them, and any relief may be awarded to the plaintiffs which can, under their general prayer, be sanctioned by the nature of their case.

Whence this important question necessarily arises; whether the court, in any suit against a plurality of defendants, where any one of them makes, and sustains such a defence as goes to the whole, can pass a decree against any other of them, who has made no such defence, or as against whom the bill might otherwise be taken *pro confesso* ?

Although the pleadings in this court are much more informal and loose than in courts of common law, yet they must be substantially sufficient in this as well as in all other courts; for otherwise the tribunal would have no means of ascertaining what was the real nature of the matter in controversy, nor of applying to it the rules of law by which it was to be decided. It is not necessary, that a plaintiff or a defendant should here, as in a court of common law, strictly adhere to any prescribed form of stating his cause of complaint, or ground of defence.(*q*) But it is in all cases as indispensably necessary here, as in a court of common law, that the plaintiff should set forth fully and substantially a cause of action or ground of complaint as then existing at the time of the institution of his suit; with this addition here, that it is in some essential particular such a case as comes properly within the cognizance of a court of equity; for if, on the final hearing, the case should not appear to be one of that description, the plaintiff can have no relief, and the bill must be dismissed.(*r*) If it appears upon the face of the bill, that the case is not one of that description, the defendant should demur; yet if he fails to do so, the court can grant no relief, but must order the bill to be dismissed.(*s*) Although the case presented may be such an one as, if true, and the bill had set forth the whole truth and nothing but the truth, would entitle the plaintiff to relief, yet if the defendant shews, by way of plea or answer, that there are other facts making a necessary component part of it, which have not been set forth, and which give to it an entirely different complexion, the plaintiff cannot be relieved; because it is thus shown, that he has no cause of action, nor any just grounds for asking relief in the case he specifies. So on the other hand, if the defendant shews, that some facts have been stated which in truth compose no part of the case, so as to give to it an equitable character which does not belong to it, the plaintiff can have no relief, because his case is not substantially that upon which he has asked it.

Hence, as it is the cause of action, as substantially stated in the bill, upon which alone the court can grant relief; and as, if, upon its face, it appears to be one of which the court cannot take cognizance; and as, if the facts, thus stated, be not substantially the whole truth, without any material suppression or addition, the

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(*q*) Kemp *v.* Pryor, 7 Ves. 245.—(*r*) Mitf. Pl. 44. 154.—(*s*) Barker *v.* Dacie, 6 Ves. 686. The King of Spain *v.* Machado, 4 Russ. 225.

plaintiff cannot be relieved; so likewise, if no such cause of action ever did exist; if it did once exist, but is shewn to have been, since, and before the institution of the suit, wholly barred, satisfied, or extinguished in any way whatever, the plaintiff cannot have any relief; because it appears, that when he instituted his suit he had no cause of action, no just ground of complaint whatever as alleged. For it is a fundamental principle in the administration of justice in whatever form, or by whatever tribunal it may be administered, that where there is no cause of complaint there can be no foundation for granting relief.(*t*)

But however self-evident this principle may appear to be, when contemplated in relation to a suit brought by one plaintiff against no more than one defendant for relief, upon a simple, entire, and indivisible cause of suit; yet, it does not appear to have been so readily and distinctly perceived where the cause of action has been compounded of various items; or where the satisfaction for the cause of suit is asked for in damages, or to an indefinite amount to be ascertained by an estimate of the nature and extent of the injury; and especially where that complexity has been increased by the relief being sought from a plurality of defendants. The cause of suit, at law as in equity, may be made up of a variety of parts joined together as one whole, or it may be an injury which can only be satisfied by some pecuniary equivalent; or the cause of suit may be the right to a subject which is in itself divisible; or it may be that the several defendants, although interested and connected as privies and parties, are yet liable only disjunctively, or in separate proportions.

Thus where the next of kin of the deceased filed their bill to recover their respective distributive shares of the surplus of certain portions of his personal estate, alleging, that he had died intestate as to those portions of it, and on the hearing it being shewn, that he had died intestate only of his *silver plate*, the plaintiffs had relief as to that, but as to the rest the bill was dismissed. The defence made and sustained going to a part only of the subject claimed, it appeared, that the plaintiffs had a valid cause of suit, and were therefore relieved.(*u*) So, in general, if a man brings an action for two things, for the recovery of both of which the action will lie, but on the trial fails to sustain his claim to one of them;

(*t*) Rigeway's Case, 3 Co. 52; Brace *v.* Taylor, 2 Atk. 253; Piggott *v.* Williams, 6 Mad. 95.—(*u*) Sprigg *v.* Weems, 2 H. & McH. 266.

yet he may have judgment for the other, his right to which he establishes.(*v*) Or suppose, that as a cause of suit the plaintiff alleges, that he has a right to a hundred acres of land which has been withheld from him; there, as the subject in controversy is divisible in its nature, the defendant may take defence for only a part, or he may defend for the whole; but if the plaintiff establishes a title which covers a less number of acres, he may be relieved; because so far he shews, that he has a sufficient cause of action. Or suppose the suit to have been brought against two or more defendants, each of whom makes a separate defence, and the defence of one, applicable to himself alone, shews, that he ought not to be charged; and the others fail in their defence; the plaintiff may have his entire relief against them, although the bill must be dismissed as to the one who had successfully defended only so far as he himself was charged;(*w*) because no defence going to the whole, and showing, that the plaintiff had no cause of action having been established, he may be relieved as against all the other defendants who had either made no defence, or failed to establish either any such general defence as went to the whole, and to show that the plaintiff had no cause of suit whatever; or any such particular defence as went to show, that although there might be such a cause of action against others, yet he, that defendant, could not be charged by it.

In these and in all similar cases, where the cause of action is made up of several distinct items; or in so far as the subject of it is divisible in its nature;(*x*) or where it bears upon the several defendants in a disjunctive, separate, or limited manner, the relief granted may be accordingly for the whole or for a part only of that which is the subject of the cause of suit; or it may be granted against all the defendants, or against some or one of them only, or against each *pro rata*, or in different proportions.(*y*) But in all cases, in equity as well as at law, the relief is, and can only be granted, because of its having been admitted or established, that there is and was, when the suit was instituted, a valid and existing cause of action, of which the court might take cognizance, and which by no defence, going to the whole, had been shewn by all, or any one of the defendants to have been entirely barred, satisfied or extinguished in any way whatever. These are general well

(*v*) Godfrey's Case, 11 Co. 45; Gregory *v.* Molesworth, 3 Atk. 627.—(*w*) 2 Will. Ex'rs. 1213.—(*x*) Robinson *v.* Bland, 2 Burr. 1082.—(*y*) Mason *v.* Peter, 1 Mun. 437.

established elementary principles by which all courts of justice, as well those of common law as of equity, are governed. They are merely modifications of the one great fundamental rule, which declares, that in so far, and no farther than there is a cause of complaint can there be any foundation for relief.

This matter is thus explained and exemplified by Lord *Coke:* "In a plea personal against divers defendants, says he, the one defendant pleads in bar to parcel, or which extendeth only to him that pleadeth it, and the other pleads a plea which goeth to the whole, the plea that goeth to the whole, that is, to both defendants, shall be first tried; and of this opinion was *Littleton* in our books, for the trial of that goeth to the whole; and the other defendant shall have advantage thereof, for in a personal action the discharge of one is the discharge of both. As for example, if one of the defendants in trespass plead a release to himself, which in law extends to both, and the other pleads not guilty, which extends but to himself; or if one plead a plea which excuses himself only, and the other pleads another plea which goeth to the whole, the plea which goeth to the whole shall be first tried; for, if that be found, it maketh an end of all, and the other defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a plea real it is otherwise; for every tenant may lose his part of the lands. As if a *præcipe* be brought as heir to his father against two, and one plead a plea which extendeth but to himself and the other pleads a plea which extends to both, as bastardy in the demandant, and it is found for him, yet the other issue shall be tried, for he shall not take advantage of the plea of the other, because one joint tenant may lose his part by his misplea."(z)

In an action of trespass for taking certain goods and chattels, against two defendants, the one pleaded a special justification, and the other not guilty; upon both of which pleas issue being joined, a jury was sworn, who found a verdict for the defendant on the special plea, and found the other defendant guilty, and assessed damages and costs. Upon a motion in arrest of judgment it was held, that if the one defendant justifies by the gift of the goods so as to destroy the plaintiff's title, and shews, that he could not have cause of action, which is found accordingly for that defendant, although the other defendant be found guilty, yet no judgment

(z) Co. Litt. 125.

shall be against him, because it appeared to the court the plaintiff had no cause of action.(*a*)

An action of covenant was brought against two for not building a house for the plaintiff according to their covenant; judgment was against one by default; the other pleaded performance, and it was found for him. Whereupon it was moved in arrest of judgment, that no judgment nor writ of enquiry of damages could be against him, against whom the judgment was by default; because, although in trespass, one may be guilty and the other not; yet in covenant, debt or other contract where it is joint, the one cannot be convicted without the other; and here by the verdict for one of the defendants, that the covenant was performed, it appeared, that the plaintiff had not any cause of action; and therefore should not have judgment; and so should it be, although the defendant against whom the judgment was by default had confessed the judgment. It was also resolved, that the defendant should have costs on the verdict against the plaintiff, for now it was a verdict against him, and that he should have neither costs nor damages against the other.(*b*)

In an action of trespass brought by *Biggs* against *Benger & Greenfield* for entering his close and taking away his goods and chattels, judgment was given against *Benger* by default; but *Greenfield* as to the force and arms pleaded not guilty, upon which issue was joined; and as to the entry and taking away of the goods he pleaded, that *Benger* had leased to the plaintiff the close therein mentioned for a certain rent, which being in arrear, he, the defendant *Greenfield*, took the goods as a distress, and thereupon the plaintiff requested and gave him license to sell the goods, and to pay the money arising thereby to the defendant *Benger* in satisfaction of his rent, which was done accordingly. Upon which issue was also joined; and a jury having been sworn to try the issues and assess damages against *Benger*, they found a verdict on the issues for the defendant *Greenfield*, and assessed damages against *Benger*. Upon a motion in arrest of judgment against *Benger* it was held, that this case of a license cannot be distinguished from a gift of goods, or a release which destroys the cause of action as to all the defendants; and therefore the judgment was arrested as to both.(*c*)

(*a*) Martin *v.* Ayliffe, Cro. Jac. 134.—(*b*) Porter *v.* Harris, 1 Levintz, 63; Morgan *v.* Edwards, 6 Taunt. 394; Weaver *v.* Prentice, 1 Esp. N. P. C. 369.—(*c*) Biggs *v.* Benger, 2 Ld. Raymd. 1372; 8 Mod. 217.

Upon this general rule, that the shewing in any way whatever, that the alleged cause of action never existed, or that it had been extinguished, furnishes a complete answer to all claim to relief, it has been settled, that if an obligee, by his will, makes one of the obligors his executor, and dies, the action at law is thereby discharged as against all; because there being at law but one duty, extending to all the obligors, the discharge, or suspension of the action as to one, extinguishes it as to all.(*d*) And although in equity, and by the act of Assembly, the debt due from such executor is to be considered as assets in his hands, yet the principles of law have not been altered in any other respect whatever.(*e*) If there be several executors they may plead different pleas; each of them may put in, for himself, none other than the plea of *plene administravit;* and as such a defence does not controvert the existence of the cause of action, but merely denies a sufficiency of assets wherewith to satisfy it; if the one of such pleas should be found for and the other against him who pleads it, yet the plaintiff may have relief against that one executor, although his suit must be dismissed as against the other.(*f*) But if, in addition to such a plea, one of the executors should plead a release, or rest his defence upon any matter going to the whole cause of action, and it should be found for him, the plaintiff must be barred, and can have no relief whatever; although the other executor had even acknowledged the action, or made default; because it would appear upon the whole record, that the plaintiff had in fact no cause of action.(*g*)

The wife, executrix to her husband, married a second husband. A bill is exhibited against them to discover the trust; the husband and wife disagree in the matter, and put in severally their answers; the husband denied the trust, but the wife confessed it. The cause proceeded to hearing, and the plaintiff proved the trust only by one witness, which the plaintiff insisted on with the wife's confession, to be sufficient; the matter being but in that wherein she was concerned as executrix. But the bill was dismissed, *quia* the wife's answer shall not bind the husband.(*h*) But upon a bill brought against husband and wife for lands held by them in her right, the husband having made default, the wife got an order to answer separately; and thereupon answered, setting forth a title to herself

(*d*) Cheetham *v.* Ward, 1 Bos. & Pul. 630; 2 Will. Ex'rs. 812.—(*e*) Berry *v.* Usher, 11 Ves. 87; Simmons *v.* Gutteridge, 13 Ves. 264; 1793, ch. 101, subch. 8, s. 20.—(*f*) 2 Will. Ex'rs. 1218.—(*g*) Elwell *v.* Quash, 1 Stra. 20; 3 Bac. Abr. 33; 2 Will. Ex'rs. 1193.—(*h*) Anonymous, 2 Ca. Cha. 39.

of the inheritance. It was held, that there could be no decree against her; but the bill was taken *pro confesso* against the husband only, and he was ordered to account for all the profits of the land received since the coverture, and the profits which should be received during the coverture, &c.(*i*)

Whence it appears, that in equity as at law, where the defence made by any one defendant extends only so far as to cover nothing more than the interest of him by whom it is made, the plaintiff may yet have relief if he establishes his claim against the other defendants; but that where the defence made by one defendant goes to the whole cause of complaint, and the plaintiff fails to establish his case in opposition to such defence, he cannot be relieved in any way whatever, although his claim should be confessed by the other defendants.

In a case where *Whistler* had given his note to *Jolliffe* for the payment of $4500, in Turkey, where *Jolliffe* continued to reside some time before his return to England, *Whistler*, after the giving of this note, made his will, appointing *Pitt* his executor, and died. Some time after *Pitt* having come to England and qualified as executor, *Jolliffe* filed a bill in chancery against him, and some others, the creditors of his testator, for an account of the assets and for the recovery of this debt. The defendant *Pitt* submitted to do as the court should direct; but the defendant creditors insisted the plaintiff was bound by the statute of limitations. The Chancellor inclined to the opinion, that the statute of limitations was not to take place. The time till *Whistler's* death being answered, and the executor being beyond sea, the statute of 4 and 5 *Anne*, c. 16, s. 19, took place, which saves the right of action as well where the debtor is beyond sea as where the creditor is beyond sea. Whereupon the case was referred to the master to take an account and to allow the plaintiff's claim, &c.(*j*) This is all that is said by the court in relation to the bearing of the several defences; whence it is evident, that had not *Jolliffe's* claim been taken out of the statute of limitations, as relied on by only a part of the defendants, he could have had no relief, even although the executor had submitted to do as the court should direct.

A *feme covert* before her marriage, with the consent of her then intended husband, conveyed an estate to her separate use, and after her marriage she borrowed £25 upon her bond: ten years after-

(*i*) Ward *v.* Meath, 2 Ca. Cha. 173.—(*j*) Jolliffe *v.* Pitt, 2 Vern. 694.

wards she made her will, thereby giving several specific legacies, and made A and B executors; on her death her husband possessed himself of moneys which she left, to the amount of £24; after which the obligee in the bond brought a bill against the executors and the husband; and one of the executors confessed assets; but the husband insisted upon the statute of limitations.

Master of the Rolls. It is true, that the bond given by the *feme covert* is merely void, and in that respect differs from a bond given by an infant, which is only voidable. It is likewise true, that the defendant, insisting upon the benefit of the statute of limitations by way of answer, shall, at the hearing, have the like benefit of the statute as if he had pleaded it. But in this case, all the separate estate of the *feme covert* was a trust estate for payment of debts, and a trust is not within the statute of limitations. From whence it seems as if the plaintiff ought to be at liberty to prosecute all the defendants, in order to be paid out of the separate estate left by the *feme covert*, to which purpose such part of the separate estate, as is undisposed of by the will, ought to be first applied. In the next place, if that be not sufficient, the creditors are to be paid out of any money-legacies given by the *feme covert;* and lastly, supposing there is still a deficiency, all the specific legatees ought to contribute in proportion. Neither can it be material, so as to excuse the other defendants, that one of the executors of the *feme covert* has admitted assets; for he might admit assets, and yet have none, nor any estate of his own. And it would not be reasonable, that this should prevent the plaintiff, the creditor, from prosecuting the other executor, or the husband, who may have possessed themselves of part of the separate estate, and ought to be responsible. For which reason, let all the executors account for what they respectively have in their hands of the *feme covert's* personal estate, or the produce thereof, and let the same be liable in the order aforesaid, reserving costs.(*k*)

From this case two points, in relation to the matter under consideration, seem to have been treated as settled: *first*, that a plea of, or a reliance in answer upon the statute of limitations by one defendant alone, if sustained, would be a sufficient bar of the whole, although the claim should be admitted by all the other defendants; and *secondly*, that the confession of assets by one executor, without actual satisfaction, is no bar to a recovery against

(*k*) Norton *v.* Turvill, 2 P. Will. 144.

the other executor; because until the entire cause of suit has been barred or satisfied, each executor is liable for the whole, so far as he may have assets. And so upon a bill of revivor against several, although but one of the defendants by his answer insisted, that he had no title to revive: it was held, that the plaintiff must at the hearing shew, that he had a good title to revive, or he could take nothing by his suit.(*l*)

A bill was filed in the Court of Chancery of New York, by *Morris* and *Mowatt*, as assignees of *Sands*, a bankrupt, against *Clason* and *Stanly*. From which case, among a variety of other circumstances, it appears, that the defendants had been partners in trade, and as such had obtained a judgment at law against *Sands*, and had also obtained a right to another judgment against him by assignment. After which *Sands* became a bankrupt; and some time before the institution of this suit, the partnership between the defendants had been dissolved. The bill prayed a discovery of what was due to the defendants, or from *Clason* to *Sands*, &c.; that satisfaction might be entered up on the judgments; and that an injunction issue to restrain the defendants from proceeding by execution, &c. The defendant *Clason* put in his answer relying on a variety of facts and circumstances in his defence, &c. *Stanly*, residing out of the State, the bill, as against him, was taken *pro confesso*, for want of appearance, after a regular advertisement to come in and answer. Testimony having been taken, and the case heard, it was decreed, that the two judgments were to be deemed fully satisfied, and to be so entered accordingly. From this decree *Clason* appealed, and the Chancellor, in assigning the reasons for his decree to the appellate court, says, speaking of the circumstance of *Clason* only having answered and made defence in the Court of Chancery, that "There was evidence, that the copartnership between *Clason* and *Stanly* was long since dissolved; and the bill having been taken *pro confesso* against *Stanly*, which entitled the plaintiffs to a decree against him, and the proceedings against the defendant *Clason* concluding to the same point, it was useless to trace what might have been the effect of a different state of things."

The judge, with whose opinion a majority of the members of the appellate court concurred, among other things, says, in relation to the matter under consideration in this case—"The first question

(*l*) Harris *v.* Pollard, 3 P. Will. 348.

which I have chosen to consider, is, as to the effect of the bill's being taken *pro confesso* against *Stanly*, circumstanced as this case is. If *Stanly* was the sole defendant, or had distinct rights, I agree that his default in appearing and answering would have been an admission of the facts charged in the bill. In *Davis* v. *Davis*, 2 *Atk.* 21, Lord *Hardwicke* says, with great propriety, that the taking a bill *pro confesso*, in equity, is analogous to taking the declaration for true, where the plea or answer of the defendant is insufficient. He was there, however, speaking of a sole defendant; and, I believe, not a case can be found in which it is insinuated, that where there are two defendants having a joint interest, and one appears and answers, and disproves the plaintiff's case, that the plaintiff can have a decree against the other who had made default, and against whom the bill was taken *pro confesso*. It would be unreasonable to hold, that because one of the defendants had made default, the plaintiff should have a decree, even against him, when the court is satisfied, from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree. Though I have not met with cases in equity to the point, yet pursuing the analogy between proceedings at law and in equity, we are not without very clear authority; for it is a well settled principle of law, that in actions upon contracts, the plea of one defendant enures to the benefit of all; for the contract being entire, the plaintiff must succeed upon it against all or none; and, therefore, if the plaintiff fails at the trial upon the plea of one defendant, he cannot have judgment against those who let judgment go by default. It would require the most binding authorities to induce me to yield my assent to such a proposition as that set up by the respondent's counsel; and, indeed, the result would be extraordinary, for if one defendant entitled himself to a decree, where the interest is joint and inseparable, a decree must be made in his favour as to a moiety of the matter in issue, and against the other who made default for the other moiety; that is, the plaintiff would get one half of a decree, and the other defendant, the other half. It cannot be so; we must consider *Clason's* defence as enuring to the benefit of *Stanly*."

The judge, with whom the minority concurred, says in relation to this matter, "the two judgments are, therefore, in force, and entitled to priority of satisfaction. I think, however, that the appellant ought not to be allowed more than a moiety of these judgments. For it appears from his answer, that the consideration

for the assignment of the one was paid by *Clason* and *Stanly*. And although the assignment was made to *Clason* alone, yet he must be deemed a trustee for *Stanly* as to a moiety; the other judgment stands in the name of *Clason* and *Stanly*. They are, therefore, to be taken as joint owners of both judgments. And the bill having been taken *pro confesso* against *Stanly*, is an admission, on his part, of satisfaction so far as his interest is concerned. The answer or defence of *Clason* cannot enure to the benefit of *Stanly;* 1 *Caines' Cas. in Err.* 121. I have not met with any case in the books where a bill has been taken *pro confesso* against one only of several defendants. But in order to give the force and effect to this default, which is contemplated by the statute, the proceedings must, thereafter, be considered in the nature of separate suits, especially where the nature of the controversy is such as to admit of distinct consideration, and separate relief. Where the defence set up goes to the essence and foundation of the claim made by the bill, and that is wholly destroyed by the party appearing, there may be some difficulty in enforcing the decree against the party who has suffered the bill to be taken *pro confesso*. But in the present case, we may consider *Clason* as attempting to enforce the collection of a debt due to himself and his co-partner, when his co-partner has acknowledged satisfaction as to his claim. If *Stanly* is to be considered jointly interested with *Clason*, it was no doubt competent to him to release or acknowledge satisfaction, so far as his interest is concerned, and his default as equivalent to such acknowledgment; and his rights are to be viewed in the same light as if he had appeared and answered, and confessed the facts stated in the bill. No injustice is done to *Clason;* a moiety is all he shews himself entitled to. If the sole and exclusive right to the partnership debts has been transferred to him, he ought to have shewn it. This answer, it is true, states a dissolution of the partnership in 1803; and that by an agreement between him and *Stanly* all the property, debts, and effects of the co-partnership became vested in him solely. The dissolution of the partnership is proved, but there is no evidence of the agreement in relation to the partnership concerns."

Upon which the Chancellor's decree was, by a majority of the court, reversed in toto; but the minority proposed to reverse it only to the extent of *Stanly's* interest.(*m*)

(*m*) Clason *v.* Morris, 10 John. Rep. 524.

Whence it appears, that in the view which the Chancellor took of this case he had deemed it entirely useless to trace what might have been the effect, if *Clason* had succeeded in establishing his defence; because as he had failed to do so, and the taking of the bill *pro confesso* against *Stanly* concluded to the same point, it was entirely unnecessary to say how far *Clason's* defence, if it had been established, should enure to the benefit of *Stanly*, notwithstanding his default. But it is clear, that the effect of a valid defence having been made by one defendant, and the bill having been taken *pro confesso* against the other, was necessarily involved in the final judgment according to either of the views taken of the case by the appellate court. And from what was said by them in regard to the general principle, that where one of two or more defendants makes a defence which so effectually goes to the whole as to shew, that the plaintiff had no cause of suit, nor any foundation for a legal complaint, he can have no relief even against the defendant as to whom the bill had been taken *pro confesso*, it is perfectly manifest, that the court were unanimous; and that the only difference of opinion among them, in this respect, was, not as to this general principle; but how far the case, then before them, could be considered as one in which the whole cause of suit had been met and repelled by the defence of *Clason*. The majority of the court held, that his defence did embrace the whole, and was, therefore, a conclusive bar to any relief as well against *Stanly*, as against *Clason*. But the minority of the court were of opinion, that *Clason's* defence did not properly and necessarily comprehend any thing more than his own separate claim; because he might be regarded, in that case, as attempting to enforce the payment of the whole of a debt due to himself and his partner, when his partner had, by his default, which was equivalent to a release, acknowledged satisfaction to the amount of his share of the debt; and therefore, although the defendant *Clason* had fully sustained his defence; yet, as his claim extended no further than to a moiety of the debt, according to the terms of the partnership between him and *Stanly*, and the manner in which it had been dissolved; the plaintiffs might well have the decree affirmed against *Stanly* alone. This then is a solemn adjudication in equity directly upon the point in question; and it is a decision which must be admitted to have great claims to respect, as well because of the sound legal reasoning by which it is sustained, as because of its

harmonizing so entirely with all the established principles of law which have any bearing upon the same subject.

It appears then, that there are, at common law as well as in equity, a variety of cases in which the plaintiff, either because of the peculiar nature of his cause of action, or because of the nature of the several defences made to it, may obtain relief against some one or more of the defendants, although he may totally fail in his suit against all the others. In equity this more frequently happens than at law; but in all cases, it arises not from the mere manner or form of proceeding, but from the substantial nature of the case itself, or of the defence which may have been made.(*n*)

In all cases where there are a plurality of defendants, they are each of them charged as such; because of their having an interest in or being jointly or otherwise liable to the alleged cause of suit. Hence it is in general true, that the answer of one defendant cannot be read in evidence against another; because in such case there is no opportunity for cross examination; and also because each defendant, considered as a necessary party, must have some interest in the event of the suit; and is, therefore, an incompetent witness.(*o*) But there are exceptions to this general rule; as where the defendant against whom the answer is proposed to be read claims under him who made it; for a defendant cannot deny the title as thus set forth by him under whom he claims;(*p*) or where the defendants are partners in trade, and as such are then competent to bind each other by such a contract as that of which they speak.(*q*) So too in the peculiar case of corporations, one or more of its officers may be made co-defendants, whose answers may be received against the body politic; and so likewise as to arbitrators and attorneys, whose answers may be read against the other parties; and this from necessity, or because such co-defendants may be converted into witnesses.(*r*) And so it would seem at common law there is a case where, from necessity, one of the defendants may be called on as a witness to testify for the plaintiff against the co-defendants, "inasmuch as some books have said, that though the witness named in the deed be named a disseisor in the writ, yet he shall be sworn as a witness to the deed."(*s*)

(*n*) Royal *v.* Johnson, 1 Rand. 421.—(*o*) 2 Mad. Cha. 441; Fereday *v.* Wightwick, 4 Russ. 114.—(*p*) Field *v.* Holland, 6 Cran. 24; Osborn *v.* U. S. Bank, 9 Wheat. 832; Jones *v.* Magill, ante 177.—(*q*) Clark *v.* Vanriemsdyk, 9 Cran. 156. (*r*) Rybott *v* Barrell, 2 Eden, 133; Dummer *v.* Corpo. of Chippenham, 14 Ves. 252. Le Texier *v.* Anspach, 15 Ves. 164.—(*s*) Co. Litt. 6.

But, although it is a settled rule in equity as well as at law, that no one can be a witness who is interested in the event of the suit; yet, as it is often proper in equity to make persons parties to the suit who have no substantial interest in the whole subject of it; or in that distinct and separate part of it as to which they may be called upon to testify,—as where a bare trustee is made a co-plaintiff or co-defendant; or where it appears, that the plaintiff has no claim to any relief whatever against one or more of the defendants; or that he has cause of suit against one only as to one subject and against another as to a different subject, but has no cause of suit against them all jointly; unless the court permits the disinterested co-plaintiff or co-defendant to be examined as a witness for the others in such case,—the really interested plaintiff may lose his right; or the plaintiff by thus making two or more persons defendants to his suit may, by that sort of mechanism, deprive the one defendant of the benefit of the other's evidence.(*t*) And therefore it is quite common in chancery, to apply by petition, to have one of the parties examined as a witness, subject to all just exceptions; and unless the interest of the party, so proposed to be examined, is perfectly apparent, the order is granted almost as a matter of course, leaving the objections to be made and considered when the testimony is brought in.(*u*) But where a defendant has been examined and received as a witness to the whole cause of action, the bill as to him must be dismissed with costs; because the plaintiff, by calling for and using his testimony, thus virtually admits, that he has no cause of complaint against him.(*v*)

Hence it may be assumed as a general rule, that where there must be a decree against all the defendants because of their joint or blended interests, there no one of them can be examined as a competent witness in the case; and upon the same ground of the indivisible and inseparable nature of their interests, the defence of any one, which shews, that the whole of such alleged joint or blended interest, never existed or has been barred or satisfied, must

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(*t*) Nightingale *v.* Dodd, Mosl. 229; Amb. 583; Murray *v.* Shadwell, 2 Ves. & B. 404.—(*u*) Casey *v.* Beachfield, Prec. Ch. 411; Piddock *v.* Brown, 3 P. Will. 288. Meadbury *v.* Isdall, 9 Mod. 438; Gibson *v.* Albert, 10 Mod. 19; Dixon *v.* Parker, 2 Ves. 219; Man *v.* Ward, 2 Atk. 228; Barret *v.* Gore, 3 Atk. 401; Armiter *v.* Swanton, Amb. 393; Franklyn *v.* Colquhoun, 16 Ves. 219; De Tastet *v* Bordenave, Jacob, 516; Fereday *v.* Wightwick, 4 Russ. 114; Hougham *v.* Sandys, 2 Sim. & Stu. 221.—(*v*) Thompson *v.* Harrison, 1 Cox. 344; Weymouth *v.* Boyer, 1 Ves. jun. 416; 2 Fow. Ex. Pra. 85, 86.

necessarily preclude all relief against any one of them. But where it appears, that the cause of suit against each arises out of distinct subjects; there, as each defendant is a competent witness as to the subject in which he is not interested, so there may, in respect to such different subjects, be separate decrees against each.

But here it has been shown, that the legal representatives of *John Henderson* are, all of them, liable to be charged by the contract set out in the bill, to the extent of the assets which have come to their hands respectively. And that, although each of them, to the extent of those assets, is so entirely liable to the plaintiffs as to entitle them to any relief, under the general prayer of their bill, that may be deemed most for their benefit; yet these defendants, as against each other, have an equitable claim to contribution; and therefore, as among them, the court may, if called upon, by a decree over, so adjust the burthen as to cause it to bear equally or in due proportion upon each of them.(*w*)

Consequently, as this cause of suit is in its nature indivisible, and the same against all of these defendants; and as no one of them has even set up, much less sustained any separate defence, which, like that of a plea of *plene administravit* by one of two or more executors, would go to show, that he could not be charged in connexion with the other defendants, the interests of all must be bound by the decree, unless it shall be found from the defence of any one, either that the whole cause of suit never existed, or that it has been barred or satisfied. It now, therefore, becomes necessary to consider the nature of the defences, which have been made to this bill of complaint.

From the general character of the answer of *English* and wife, and from the express and distinct allegations in the body of it, and also from its having been received and replied to by the plaintiffs; the court may now regard it as the separate answer of each, as much so as if the wife had obtained an order expressly allowing her to answer separately. A wife cannot, under any circumstances, be a witness for or against her husband; and for that reason, he can in no case be bound by any thing she sets forth in her answer.(*x*) Consequently, whether this is to be considered as altogether a joint answer; or as being in fact two regular and distinct answers of these defendants, it is clear, that nothing

(*w*) Meadbury *v.* Isdall, 9 Mod. 438; 1 Mad. Chan. 233.—(*x*) Le Texier *v.* Anspack, 15 Ves. 165.

which *Lydia* has said can be allowed to affect the interest of her husband *David*. But in the body of this answer, which has been properly sworn to by her as well as her husband, she expressly declares, that as to various circumstances as therein set forth by way of defence, she speaks for herself alone, as the administratrix of the deceased *John Henderson*. Where a bill was filed by a legatee against husband and wife, she being the executrix, and after they had answered he died; it was held, that she was bound by the answer they had so made in his lifetime.(*y*) And where the husband and wife had not answered separately, or had not so answered under the previous sanction of an order of the court, she was held bound by so much of the answer as was called for and purported to come from her;(*z*) or which in point of fact had been made by and received from her as her separate answer.(*a*) And if a wife who is executrix knows, or apprehends, that her husband will answer to her prejudice, or if in any case she disapproves of the defence he wishes to make, the court will give her leave to answer separately.(*b*) So that in whatever way this answer of *English* and wife is taken, as nothing therein set forth, as coming from her, can affect his interest; and as he professes, so far as he answers for himself, to know nothing of the matter, the several parts of it, which so distinctly profess to be the allegations of each, may safely and most advantageously for each be treated as if they had been set forth in regular and entirely separate answers from each of them.

Taking this answer in this way, then, it appears, that the defendant *David English*, without expressly denying any thing, admits nothing; but puts the whole of the plaintiff's case in issue. His defence goes to the very origin, foundation and existence of the plaintiff's whole cause of suit; and, therefore, it behooves them to sustain their whole case in every way against him, or they must totally fail. The defendant *Lydia*, in effect, admits the original foundation of the plaintiff's cause of suit; but, by way of avoidance, considering it as a contract of bargain and sale of a tract of land, avers, in substance, that the purchase money, in the modes therein described, has been paid and fully satisfied. This defence,

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(*y*) Shelberry *v.* Briggs, 2 Vern. 249.—(*z*) Wrottesley *v.* Bendish, 3 P. Will. 236; Le Neve *v.* Le Neve, 3 Atk. 648.—(*a*) Chandos *v.* Talbot, 2 P. Will. 371.—(*b*) *Ex parte* Halsam, 2 Atk. 50; Wybourn *v.* Blount, Dick. 155; 2 Eq. Ca. Abr. 66; Mitf Pl. 104.

being one by which she confesses and avoids the cause of suit, it lays upon her to prove her allegations in avoidance; or otherwise, if the plaintiffs sustain their cause against the broad defence of her husband *David*, they must be relieved as prayed against both of them. Again, the defendant *Richard Henderson* pleads the statute of limitations; by the form of which he, in substance, avers, that, although the cause of suit might have once existed; yet, as the original contract had not been in any way renewed by any recent acknowledgment or promise, it has been altogether barred by the prescribed lapse of time. If this be a plea properly applicable to the nature of this case, and if it be in fact true, then, as it goes to the whole cause of suit, and shows that it has been totally barred, the plaintiffs can have no relief whatever.

It is perfectly clear, therefore, from what has been said, that if either one of these three defences be sustained, the plaintiffs can have no relief; and that their bill must be dismissed with costs, notwithstanding it might otherwise have been taken *pro confesso* against the two defendants who have made default.

The plaintiffs have stated their case with a double aspect, so as to entitle themselves to relief in either of the alternatives upon which they rely. They have rested their case upon its being considered either as a conveyance in trust, or as a bargain and sale, leaving the purchase money unpaid. They have stated their case in this way, as they believe it to have been; but as a reason for not being more exact in every particular, they say, "of this, or of the terms of the contract, if any, they have not been able to discover any positive proof;" and thus admit, that their statements may be in some respects inaccurate; because they were not in possession of that information which would enable them to set forth their case with greater certainty; and therefore, they pray a discovery of the defendants. If then the statements of the bill were in any essential particular incorrrect, the defendants should have objected to it on that account; but they have not done so; and therefore the plaintiffs are entitled to have their bill now regarded as entirely sufficient, so far as it sets forth a case which, in substance, entitles them to the relief they ask.(*c*)

There is no proof of any thing like a trust; therefore, that alternative view of the plaintiff's case may be at once put aside. The

(*c*) Carew *v.* Johnston, 2 Scho. & Lefr. 305; Wright *v.* Plumptre, 3 Mad. 480; Zane *v.* Zane, 6 Mun. 406.

deed of the 8th of May, 1807, proves, that *James M. Lingan* did then convey the tract of four hundred and twenty acres of land in the bill mentioned to *John Henderson;* the receipt or memorandum of the 10th of June, 1807, which has been authenticated, proves, that the purchase money was not then paid; and the witness *Henry Waring*, in consistency with, and in corroboration of these instruments of writing, proves, that *John Henderson*, in his lifetime, repeatedly admitted he had purchased the land referred to in those instruments of writing, for which he was to pay thirteen dollars and one-third of a dollar per acre; but that he had paid no part of the purchase money, and was unable to pay it; and this witness further proves, that the land was held by *John Henderson* until his death, when it descended to his children, who are defendants to this suit. There is no proof of the purchase money ever having been paid. It is admitted, that *James M. Lingan* is dead, and that these plaintiffs are his legal representatives. This is the substance of the case, according to the proofs, and in all material points, it accords exactly with one of the alternatives of the case set forth in the bill.

Whence it is sufficiently clear, that the plaintiffs have sustained their case in opposition to the general defence of *David English.* And, as there is not the least evidence of any payment or satisfaction ever having been made in the manner relied on in defence by the defendant *Lydia English*, the plaintiffs may obtain relief against her also as well as her husband.

The defendant *Richard Henderson* has put his defence entirely upon his plea of the statute of limitations; and the plaintiffs having established their case in all respects in opposition to the other defences; and the other defendants having made default; the whole controversy is thus reduced to the single question, whether this be a valid defence against the whole or not. It is, therefore, proper, that it should be carefully considered.

All statutes of limitation proceed upon the policy comprised in the maxim, *interest reipublicæ ut sit finis litium;* that some lapse of time must be prescribed in order to give quiet to human affairs; and as affording ground to presume, without the power of contradiction, that the alleged cause of controversy, either never existed at all, or that if it did once actually exist, it had been in some way finally adjusted and satisfied.(*d*) This principle of

(*d*) 1 Stark. Ev. 33; 4 Stark. Ev. 1234; Smith *v.* Clay, 3 Bro. C. C. 639, note

limitation, under one or other name or form, is to be found in all codes of law. It is a rule, which, as to some cases, is prescribed in positive terms by the legislature, while as to others it is the result of usage or judicial decisions; but in all instances the lapse of time specified, as applicable to the case, gives a rule by which all courts of justice are bound. The statute of limitations does not apply in terms to proceedings in courts of equity; it applies to particular actions at common law, and limits the time within which they shall be brought, according to the nature of those actions; but it does not say there shall be no recovery in any other mode of proceeding. If the equitable title be not sued upon within the time within which a legal title of the same nature ought to be sued upon, to prevent the bar created by the statute, the court acting by analogy to the statute, will not relieve. If the party be guilty of such laches in prosecuting his equitable title as would bar him, if his title were solely at law, he shall be barred in equity; that is all the operation this statute has or ought to have on proceedings in equity.(*e*)

But at law, as well as in equity, there are various peculiarities, which have been held to be sufficient to take a case out of the operation of the rule. They are either such as have been omitted to be noticed in the statute itself;(*f*) or they are such as the statute has expressly specified; or they are such as arise out of facts and circumstances,—as where the courts of justice have been closed by some great national calamity;(*g*) or where the parties stand in the relation to each other of trustee and *cestui que trust*;(*h*) or where the party, by omitting to plead or ask in his answer the benefit of the statute of limitations, thereby tacitly admits, that the rule cannot or need not be applied to his case;(*i*) or where, by an express declaration or acknowledgment admitting the claim, he thereby renews the contract or cause of suit, and thus tacitly admits that his case is not within the terms of the rule.(*j*) In all cases where this court, having cognizance of the whole case, finds it unconscionable to suffer the statute of limitations to be applied, it will be disregarded; and in all other cases, of which this court does

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(*e*) Bond *v.* Hopkins, 1 Scho. & Lefr. 428; Stackhouse *v.* Barnston, 10 Ves. 466; Shipbrooke *v.* Hinchingbrook, 13 Ves. 396; Cholmondeley *v.* Clinton, 2 Jac. & Walk. 139; Christophers *v.* Sparke, 2 Jac. & Walk. 233; The Rebecca, 5 Rob. Ad. Rep. 104; Morgan *v.* Davis, 2 H. & McH. 17.—(*f*) 4 Bac. Abr. 472.—(*g*) Co. Litt. 249. (*h*) 4 Bac. Abr. 473.—(*i*) Prince *v.* Heylin, 1 Atk. 494.—(*j*) Oliver *v.* Gray, 1 H. & G. 213.

not take cognizance, because of its being improper to break in upon the regular course of legal proceedings more than is necessary for the purposes of justice, it will prevent a party from taking an unequitable advantage of the statute of limitations, or any lapse of time at law.(*k*)

Defences resting upon the statute of limitations at law, or upon the same lapse of time in analogous cases in equity, seem to have been treated with a rather unsteady hand. They have been sometimes regarded as deserving much favour, while at other times they have been scowled upon as subterfuges, resorted to for the purpose of escaping from the real merits and justice of the case; and particularly so, where, as in this instance, such a defence has been relied on by only one of a plurality of defendants as a total bar to the whole cause of suit. But there cannot be, in reality, any such pliability in the general rules of law as will allow of their being bent and twisted in one way or other at the pleasure of any court of justice by whom they may be administered.

Here, however, it is insisted by this plea, that neither this defendant *Richard Henderson*, nor *John Henderson* deceased, did at any time within *three* years, before the exhibition of this bill of complaint, promise or agree to pay, or satisfy the plaintiffs or *James M. Lingan*, any sum of money on account of the transaction in the bill of complaint mentioned. From which it would seem, that, although it is insisted, the whole cause of suit has been barred by the statute of limitations, yet, as this defendant *Richard Henderson* has denied, that he himself made any promise, his plea does thereby tacitly concede, that an acknowledgment of this cause of suit, made by himself or any other of his co-defendants, would take the case out of the statute; upon the ground, that if such a plea from any one defendant would be a bar to the whole, then an acknowledgment by any one would revive the whole. And if so, then, apart from the defences of *English* and wife, as there is here a default and tacit admission of the whole by two others of these defendants, this plea of the defendant *Richard Henderson* can be of no avail to himself, or to any of his co-defendants.(*l*)

If this position be tenable, then it is evident, that as in all cases, where the statute of limitations is not expressly relied on, it is considered as waived, it can in no case be received as a valid defence, where there is a plurality of defendants; unless each one,

(*k*) Bond *v.* Hopkins, 1 Sch. & Lefr. 430.—(*l*) Johnson *v.* Beardslee, 15 John. Rep. 3.

or all of them together, expressly rely upon it. But, as has been shown, it is a well settled rule, in equity as well as at law, that any defence coming from any one of a plurality of defendants, which goes to the whole, and shows, that the plaintiff has no cause of suit, effectually precludes the court from giving relief in any way whatever against any other defendant, as well as against him who makes such a defence; because a plaintiff can only obtain relief upon the strength of his own title, and by shewing, that it is good against all the world as well as against each one of the then defendants; and also, because every court of justice must act consistently, and cannot be allowed to contradict itself, by saying, in the same decree, in the same case, that the plaintiff has no cause of suit whatever; and also, that he has a just and well founded cause of complaint.(*m*)

It may therefore be regarded as an inflexible general rule, which admits of few, if any exceptions, that according to any view which can be taken of the case, or upon any defence made against it, if it appears, upon the whole record, that the plaintiff's title, or cause of suit, is a mere nullity, or has been barred, satisfied, or extinguished in any way whatever, he can have no relief.

There are, however, some cases which present an apparent exception to this general rule. A court of equity may, and always does, shape its decree according to the nature of the case, so as to place the burthen as nearly as may be where it ought to rest. Where there are many defendants, and some or one of them only is found liable to the plaintiff's cause of suit, the bill may be dismissed as to the others; or a defendant who has been made so merely because of his being the depository of the fund, for the purpose of having it detained in his hands by injunction, may, by the dissolution of the injunction, cease to be a necessary party, even before the case has been brought to a final hearing;(*n*) or if the plaintiff has a separate cause of suit against each, then each of them may be charged according to their respective liabilities; or where all the defendants are alike bound for the whole to the plaintiff, but some of them stand only as sureties for the other, there the court may, by a decree over, provide for the relief of the sureties against their principal, in case they should satisfy the claim, or direct a contribution, in case any one surety should pay more than his proportion. These instances are

(*m*) Gregory *v.* Molesworth, 3 Atk. 626.—(*n*) 2 Mad. Chan. 191.

common, and the course of the court, in that respect, is well settled. The court is involved in no contradiction or inconsistency by any such decree; as a defendant in equity can only be charged to the extent of his liability, so the court's decree against him must be modified accordingly. But as no one can be permitted impertinently to interfere with a matter by which he is not proposed to be, or obviously cannot be charged, a defendant cannot be allowed to direct any sort of defence against all or any distinct portion of the plaintiff's cause of suit in which his interests are not implicated, or by which he can be subjected to no kind of liability. Where, however, a defendant's liability is such, as principal or otherwise, that he must be charged by a decree which affirms the validity of the alleged cause of suit, then he may rightfully direct any defence against it which goes to shew, that neither he himself, nor any one of his co-defendants, ought to be charged by it; and if he succeeds in establishing such a defence, the plaintiff's bill must be totally dismissed.

Hence it is obvious, that this class of cases, in which the court may find it necessary or proper, because of their peculiar circumstances, to pass a separate, a reciprocal, a direct, or an inverted decree, do in reality present nothing which can fairly or in any way be considered as an exception to this general rule.

But where two or more persons have been bound by the contract upon which the suit has been brought, and one of them pleads the statute of limitations in bar, it has been said, that an acknowledgment made, within the limited time, of its then existing validity by such defendant, or by any other of his co-defendants, will take the case out of the statute. The adjudications in relation to this matter are various and contradictory. Therefore, without attempting to reconcile them, it will be sufficient to trace out the reason of the law so far as it is believed to be properly applicable to this and all such cases in equity.

To constitute a valid contract of any description, it is indispensably necessary that the parties should be competent to contract; and being so competent, that they should all of them, in the manner prescribed by law, understandingly have given their free consent to the contract in question. In general, when the contract purports to be the obligation or promise of two or more persons, it must be shewn, that each one of them distinctly gave his consent to it, and thereby actually and in terms for himself became so

bound. But where there exists a partnership in trade, each partner may make certain contracts in the name of the whole which shall be obligatory alike upon all the partners. Now, in all such cases, any one of the contractors may satisfy the entire demand of the contract; and upon its terms being wholly complied with by any one of them, it is thereby totally extinguished and ceases to be any longer obligatory upon any one of them in favour of him to whom it was given. That a contract may be wholly satisfied by any one of the contractors, and when so satisfied is thereby totally extinguished as to all, is a principle of law so obviously rational and just, that it need only to be stated to be universally admitted.

Consequently it is equally manifest, that any *renewment* of a contract, which has been thus satisfied, barred or extinguished, can only be effected by the exercise of a similar capacity to contract to that which had been called forth for its original formation. Suppose then, the alleged cause of suit to be an agreement whereby all the defendants had bound themselves to pay to the plaintiff a certain sum of money. In support of such a cause of suit it is necessary to prove, that each one of the defendants, by his express consent, did actually become bound by it. And, therefore, after it has been barred or extinguished, it is no less necessary, in order to show that it has been *renewed*, to prove, in like manner, that each of the defendants did, by his express consent, become bound by such new agreement; because it is no less essential to the validity of the *new*, than it was to that of the *old* agreement, that it should be shewn to have been expressly assented to by each one who is proposed to be charged by it. Where there is no separate cause of suit against any one defendant, and each one of them is no otherwise chargeable by such agreement than as party with all his co-defendants, it must be established as an agreement to which all are liable, or the plaintiff can take no benefit from it, and his bill must be dismissed. But where it is shewn, that a partnership in trade did actually exist between the defendants, there, as during the continuance of such partnership, all the partners may join in making a promissory note, or the like, in relation to their trade, so as to bind the firm; so, during the continuance of the partnership, a promise by any one of the partners will as effectually *renew* such contract, as an express promise by all of them; because, during the continuance of the partnership, each partner has the power to

make a contract of that nature, which shall be obligatory upon all.(*o*)

Hence it follows, as a promise or acknowledgment can only take a case out of the statute of limitations because of its being, of itself, a new promise, or because of its being satisfactory evidence of the *renewment* of the contract, it is perfectly clear, that such promise or acknowledgment must come, not merely from one alone, but from each, or all of the contractors, or from a partner in trade who has a then power of contracting in the name of all. And, consequently, a promise or acknowledgment of one alone of several contractors, or of one partner, after the dissolution of the partnership, can no more take a case out of the statute of limitations than the promise of one man can be allowed to operate as an original obligation upon another, without his consent.(*p*)

Where a plaintiff's cause of suit is made up of several distinct parts, each of which may have been separately accounted for and satisfied; there, as the statute may have a distinct operation against each part, a plea of the statute of limitations may be supported as a good bar to some of such separate parts, though not to the whole.(*q*) But a contract which is entire and indivisible in its nature, must necessarily be altogether good or bad; it must be executed as it stands, or be totally rejected. If it makes no discrimination between the several contractors who are bound by it, the court can make none, at least to the prejudice of him for whose benefit it was made; since it is a settled axiom of law, from which no court of justice has ever ventured substantially to depart, that the obligation of a legal contract cannot be impaired in any way whatever. So far as the courts of justice are concerned, all the incidental as well as all the direct obligations of contracts have been most sacredly preserved; and, that this inestimable judicial rule should be made universal and unalterable, it has been declared

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(*o*) *Ex parte* Dewdney, 15 Ves. 480; Whitcomb *v.* Whiting, Doug. 652; Tinkler *v.* Walpole, 14 East, 226; Gow. Part. 79, 212; 4 Stark. Ev. 896; Blanch. Stat. Lim. 124; Clementson *v.* Williams, 8 Cran. 72; Clark *v.* Vanriemsdyk, 9 Cran. 156; Bell *v.* Morrison, 1 Peter. 367; Walden *v.* Sherburne, 15 John. Rep. 409; Rootes *v.* Wellford, 4 Mun. 215; Fisher *v.* Tucker, 1 McCord, 172; Wilmer *v.* Harris, 5 H. & J. 9; Ward *v.* Howell, 5 H. & J. 60.—(*p*) Hyleing *v.* Hastings, 1 Ld. Raym. 389; Boydell *v.* Drummond, 2 Camp. 157; Sterndale *v.* Hankinson, 1 Sim. 393; Jones *v.* Moore, 5 Binn. 573.—(*q*) Webb *v.* Martin, 1 Levintz. 48; Coventry *v.* Apsley, 2 Salk. 420; Aldridge *v.* Duke, 3 Mod. 110.

by the Constitution of the Union, that no State shall pass any law impairing the obligation of contracts.

But, if a bond, promissory note, or contract binding two or more persons could be split up among them, and their general and common liability portioned out upon each, it might, in that way, be so essentially altered as to be no longer the contract into which they entered; its benefits might be cut down, scattered and totally lost; its burthens might be made to bear upon each in a manner wholly different from that to which he had consented; and its incidental obligations, entitling a contractor to a remedy over, or to contribution, might be partially or totally set aside without his consent, and to his utter ruin. These would be some of the inevitable consequences of allowing a plea of the statute of limitations to be received as a bar of the cause of suit founded upon such a contract, so far only as to be an exoneration of the contractor, by whom it was pleaded, leaving the others to bear the whole burthen or only so much of it as should remain, after, some how or other, deducting that which ought to have been borne by him who had been so discharged. Any such partial or proportional impairment of the contract would, however, not only be unjust and unconstitutional, but the execution of such a rule, as, that a plea of limitations should enure only to the benefit of him who pleads it, might be found, in cases, such as creditors' suits, where a great number of persons had been brought or let in as parties having a variety of conflicting interests in the controversy, to be arithmetically and absolutely impracticable.

But, in the case now under consideration, there was originally but one person, *John Henderson*, liable under the contract set forth in the complainants' bill; and therefore, any acknowledgment coming from him might well have been considered as a new contract, upon the terms set forth, so as to bind him, and take the case out of the statute of limitations; but by his death, the liability has devolved upon all these defendants; and therefore, as no one of them has the power alone to make a new contract upon the same terms so as, in like manner, to bind all the others; so no tacit admission, or acknowledgment, or even express promise of any one of them can be received as sufficient to take the case out of the statute of limitations, if it shall appear to have been properly applied and relied upon by this defendant, *Richard Henderson*, alone.

From their nature, pleadings in equity do not in general admit of the same precision as pleadings at law; but in equity, as well as at law, the pleadings must be substantially sufficient. The plaintiff is not tied down to any particular form of stating his case in his bill; for, however loosely or awkwardly its statements may be made, yet he may obtain the relief he seeks, if, upon a fair reading of the whole, it appears, that a sound case has been substantially set forth. But if a defendant in equity puts in a *plea*, considerable precision is required; because he thereby proposes to reduce his case to a single point.(*r*) And therefore, as to pleas in equity, there does not appear to be any material difference between the rules of a court of common law, and those of a court of chancery. Where the case, as stated in the bill, appears to involve several distinct subjects as component parts of one complex whole, and the defendant offers a plea in bar, it must be so framed as to be exactly applicable to the case; for if it be impossible to know to which of the several subjects spoken of in the bill it precisely refers, it will be deemed bad in form as well as in substance.(*s*) So too a plea in equity, as well as at law, must tender a *material* issue; it must not only reduce the defence to a single point, but that point must be of such a nature as, when determined, will enable the court to put an end to the case.(*t*) In equity, as at law, a plea of the statute of limitations must be properly applicable to the particular nature of the case; as where a note was given for the payment of an annuity during the life of the annuitant, the defendant pleading, that he did not promise to pay within six years is bad; he should have pleaded the cause of action hath not accrued within the six years.(*u*) And so, in an action of trespass, the statutory limitation to which is *four* years, where the defendant, instead of relying upon that lapse of time as a bar, pleaded not guilty within *six* years; the plea upon demurrer was held bad; because it did not precisely disclose, and rely upon that which had been made a bar by the statute.(*v*) Whence it appears to be necessary, that the plea of this defendant *Richard Henderson*, should be found to have reduced the defence to a single material point, the determination of which will enable the court at once to put an end to the case.

(*r*) Carew *v.* Johnston, 2 Scho. & Lefr. 305; Rowe *v.* Teed, 15 Ves. 377.—(*s*) Meder *v.* Bert, Gilb. Eq. Rep. 185; Talbot *v.* May, 3 Atk 18.—(*t*) Jones *v.* Davis, 16 Ves. 264; Morrison *v.* Turnour, 18 Ves. 181; Steff *v.* Andrews, 2 Mad. Rep. 5; Co. Litt. 126.—(*u*) 3 Atk. 70; Gould *v.* Johnson, 2 Salk. 422.—(*v*) Blackmore *v.* Tidderley, 2 Ld. Raym. 1099; Macfadzen *v.* Olevant, 6 East, 389.

The bill being framed in the alternative, asking either a reconveyance of the land or the payment of the purchase money, this defendant *Richard Henderson* has directed his defence mainly to the latter alternative, being well aware, that there was no evidence of any such trust as could authorize the plaintiffs to call for a reconveyance of the land. And, regarding the bill in this latter aspect, as praying only for the payment of the purchase money, it has been urged, that it is, in effect, no more than a suit for the recovery of money due by simple contract, to which this plea is as properly applicable as it would have been to such a demand in a court of common law. The defendant *Richard Henderson*, confidently proceeding upon this ground, as it would seem, has accordingly so framed his defence. His plea, after referring to and reciting the act of 1715, ch. 23, avers, that neither he nor the said *John Henderson* deceased, did at any time within *three* years before exhibiting the bill or serving or suing out process against the defendant, promise or agree to come to any account for or to pay, or any way to satisfy the complainants, or the said *James M. Lingan* any sum of money for or by reason of the matters, transactions, or things in the bill of complaint mentioned.

But, although this may be admitted to be one of the views which may be taken of the case set forth in the bill, yet it does not comprehend and reduce to a single point all the material equity which belongs to it; on the contrary, considering it as nothing more than a bill for the recovery of so much money, due by simple contract, it may well be doubted, whether this court could take cognizance of it at all. But this is, in substance, a bill by vendors against purchasers to enforce an *equitable lien* as a means of recovering the purchase money; and therefore, admitting it to be true, that the cause of suit, so far as it is founded in simple contract, which is the only point presented by the plea, has been barred by the statute of limitations, yet the determination of that point does not close the substantial equity of the case, because the plaintiffs' equitable lien must still remain to be disposed of by the court.

But the act of assembly, which prescribes the limitation of actions upon bonds, notes, and simple contracts, does not apply to suits in chancery, for the recovery of money secured by a mortgage, or an equitable lien; or to mortgages in any way or of any description. For even supposing, that, along with a mortgage, a bond or note had been given as a security for the same debt; and a suit had been brought on the bond or note, which had been, on a

plea of limitations, adjudged to be barred; yet, that would not have affected the party's remedy upon the mortgage; because, the suit in chancery upon the mortgage involves the title to the land, which, by analogy, can only be barred by the limitation of *twenty* years. At law the lapse of twelve or three years is an absolute bar to the remedy upon a bond or simple contract. But a mortgage is a security of a higher and more durable nature; one by which the right to the land is pledged for the payment of the debt. The lapse of twenty years, in such cases, has been allowed, by analogy, and not by any direct operation of the statute limiting the time within which an entry into land must be made, to raise a presumption, either that the debt so secured never was due, or that it had been paid.(*w*) And, upon the same principles, a similar presumption of satisfaction after the lapse of twenty years has been held to be a bar to a bill for the recovery of the purchase money founded on the vendor's equitable lien.(*x*) But, where a mortgage, and a bond or note has been given to secure the payment of the same debt, the creditor may sue on all his remedies at the same time. He may file a bill in chancery to foreclose, bring an action of ejectment, and also an action upon the bond or note. The lapse of *twelve* or *three* years would be a bar of his action upon the bond or note; but the ejectment could only be barred by a lapse of *twenty* years. The bill in chancery to foreclose the mortgage or to enforce the equitable lien, being analogous to the proceeding at law by ejectment upon the mortgage, can only be barred by a similar lapse of time.(*y*) Hence, although issue has been joined on this plea, it must be regarded as a nullity; since there is nothing in the case to which it can at all apply.

Recollecting that the deed of conveyance from *James M. Lingan* to *John Henderson*, bears date in May, 1807, after which *John Henderson* repeatedly acknowledged, that he had paid no part of the purchase money; that a plea admits the truth of every thing stated in the bill not denied by it; that there is no answer in support of this plea denying the truth of those acknowledgments charged in the bill to have been made by *John Henderson*, which would certainly take the case out of the statute had it been barred in his lifetime; and that this suit was instituted in November, 1821, it is

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(*w*) Toplis *v.* Baker, 2 Cox. 123; Pow. Mort. 361, note T. 393 note, 1153, 1155. (*x*) Bidlake *v.* Arundel, 1 Rep. Cha. 93; Hunton *v.* Davies, 2 Rep. Cha. 44; Mathews Presum. 395.—(*y*) Pow. Mort. 966, note G.; Hughes *v.* Edwards, 9 Wheat. 494.

perfectly evident, that the statute of limitations, in no form in which it could have been relied on as a defence, could operate as a bar to the equitable lien by which this land was bound to the plaintiffs for the payment of the purchase money. And it being entirely clear, from the pleadings and proofs, that the purchase money agreed to be paid by the late *John Henderson*, for the four hundred and twenty acres of land he purchased of the late *James M. Lingan*, never has been paid by any one; and that the vendor's lien for its security never has been abandoned, or in any way extinguished, the plaintiffs must be relieved, under their general prayer, in the most advantageous and effectual manner authorized by the nature of their case.

Whereupon it is *Decreed*, that the bill of complaint as against the absent defendants, who have not answered, be taken *pro confesso*. *Decreed*, that the statement of the auditor be confirmed; and that the defendants, on or before the 8th of June next, pay or bring into this court, to be paid unto the said *Janet Lingan*, as administratrix of *James M. Lingan*, the sum of $11,924 14, with legal interest on $5573 33, part thereof, from the fifth day of the present month until paid or brought in. And *Decreed*, that upon the failure of the said defendants to pay or bring into court the said sum of money as aforesaid, that then the said land and property in the proceedings mentioned, be sold for the payment of the same; that *Louis Gassaway* be and he is hereby appointed trustee to make the said sale, &c. &c., in the usual form.

The defendants appealed from this decree, and at June term, 1830, the Court of Appeals reversed the decree, and dismissed the bill of the complainants with costs, but filed no opinion. In the case of *McCormick* v. *Gibson*, 3 *Gill & Joh.* 18, the Court of Appeals have, however, concisely stated their views of this case.

OGDEN *v.* OGDEN.

The statute of frauds does not embrace mutual promises to marry, but extends only to agreements to pay marriage portions; and in such cases according to the proper signification of the word agreement; the whole, the *consideration* as well as the *promise*, must be in writing.

If a person writes a letter promising to give a fortune with his daughter or niece to a man if he should marry her; and, under the encouragement of the letter, the man does marry her, he shall recover; the agreement having been executed as far as it could be on his part; but the court must be satisfied, that the letter imports a concluded agreement, or affords sufficient materials for a more formal agreement.

This bill was filed in Baltimore County Court, on the 7th of June, 1818, by *John W. Ogden* and wife, to recover of the representatives of their late uncle *Amos Ogden*, a marriage portion, which the bill alleges, he had promised to give her. After the answers had come in, and testimony had been collected, under a commission issued from that tribunal, the case was removed to this court under the act of 1824, ch. 196, and the proceedings filed here on the 15th of May, 1826. Some time after which the case was brought on for a final decision. All the circumstances are fully and carefully stated by the Chancellor.

5th June, 1827.—Bland, *Chancellor*.—This case standing ready for hearing, and the solicitors of the parties having been heard, the proceedings were read and considered.

Laying aside such of the allegations of the parties as are neither admitted nor sustained by proof, with the irrelevant testimony, and the case is this:—*Amos Ogden*, owing to some unhappy circumstances, had separated, and lived apart from his wife, during a period of about thirty years before his death; he had no children; and his wife survived him. At the time of his death he had a considerable estate; consisting of lands lying in Baltimore county, lands in the Big-bend of Green river in Kentucky, and some personal property. About ten years before his death, his niece *Nancy Ogden*, then about seventeen years of age, was brought to live with him. He maintained and educated her; and she managed his household affairs; in which situation he became so attached to her as to consider her as his adopted child.

Some time in the early part of the year 1817, *John W. Ogden*, a nephew of *Amos'*, and a cousin of *Nancy's*, visited and addressed her; a mutual attachment was formed, and they became engaged to be married at a convenient time thereafter. On the

first of May, 1817, *Amos Ogden* bound himself, by a bond, to distribute most of his personal property among *Amos Ogden* of *Stephen*, *Nancy Ogden*, and *Sarah Burket*. Under these circumstances, on the 22d of May, 1817, he wrote a letter to his brother *Benjamin Ogden*, the father of *John W. Ogden*, of which the following extract is all that is material to this case:—

"Dear Brother—

"With joy, on the 17th of April last, I received your favour by your son Capt. *John W. Ogden*, together with my land papers on *Phillips*, and have to regret, that I have been compelled in giving you so much trouble in the arrangement of my business. But mean to compensate, if giving the largest part of that land will compensate, to your children. I shall deed to your daughter *Mary T. Harpenden*, and your son *Stephen T. Ogden*, two hundred acres each, and the remainder to your son *John W. Ogden*, and his expected spouse *Nancy Ogden* of our dear brother *Stephen*, as joint tenants, and to the survivor in fee simple for ever. I have got to inform you, and my loving sister *Nancy Ogden*, your dear wife, that my dear adopted daughter *Nancy Ogden* of *Stephen*, and your son *John W. Ogden*, is expected to be married some time between this and next spring, as will best suit his return to Maryland. I can tell you, my dear brother, (though my heart bleeds at the idea of her leaving me forlorn of any child to comfort me in my advanced age of life,) I rejoice to think, that she is agoing to be connected to so worthy a man as your son; and I have no doubt but that the Lord will bless them in their affections. She has lived with me nearly ten years, and has conducted herself in such an amiable manner, that both at home and abroad she is beloved. As to the things of this world, I shall bestow on her, at her parting with me, about six thousand dollars worth of real and personal property; and at my death, if blessed by Divine Providence, at least as much more. You and I do not agree as to the real value of the land in the Big-bend; I should be loth to convey that land to a stranger for less than ten dollars per acre. You will recollect, brother, that there is a great many people in Europe, and as soon as opportunity will admit, will emigrate to America."

This letter was endorsed in the same handwriting, thus:—"Copy sent *Benj. Ogden*."

Amos Ogden, on the 27th of May, 1817, a few days only after he had written this letter to his brother, made his will, in which, among other things, he says:—"And whereas it is agreed and

expected, that my nephew *John Wesley Ogden* of *Benjamin*, and my niece *Nancy Ogden* of *Stephen*, will be married to each other some time early this ensuing winter; therefore I give unto them the said *John Wesley Ogden* and *Nancy Ogden*, as joint tenants and to the survivor in fee simple, seven hundred acres of land in the State of Kentucky, it being a part of a tract of land, that I purchased from a certain *Philip Phillips*, out of his twenty-two thousand one hundred and seventy, on the north side of Green River, and to begin at the upper corner of said survey," &c. "I also give to them the said *John Wesley Ogden* and *Nancy Ogden*, as joint tenants and to the survivor in fee simple for ever, part of a tract of land lying and being in Baltimore county, and known by Taylor's Purchase, it being part of that part of Taylor's Purchase that I bought of the real estate of *William Lux*, and was deeded to me by *Samuel Moale*, Esqr. as trustee by order of the Honourable Chancellor, and to be strictly included within the following metes and bounds, courses and distances," &c. "But it is to be understood, and so my will is, that the said *John Wesley Ogden* and *Nancy Ogden*, shall not be entitled to the said part of Taylor's Purchase, except they shall pay, or cause to be paid, such debts or balances of such debts, and to such persons as I shall charge against her the said *Nancy Ogden*, and only charged and credited on the pages of this my will, and that in my own handwriting," &c. "And whereas I have had many services from *Amos Ogden* and *Nancy Ogden* and *Sarah Burket*, and to secure them in part for such services, I have given to them my bond for the conveyance of all my personal property as hereto annexed, and dated 1817," &c.

The marriage of *John W. Ogden* and *Nancy Ogden* was solemnized on the 25th of December, 1817, and they lived with their uncle until his death, which happened on the 10th of February following, without his having altered or revoked the will he had so made and published. The original letter of the 22d of May was received by *Benjamin Ogden*, to whom it was directed; and was sent by him to *John W. Ogden*, but miscarried, and has been lost. The copy now produced was seen in the hands of *John W. Ogden* as early as the month of August previous to his marriage; but how he obtained possession of it does not appear; it has been however proved to be an exact copy, and altogether in the handwriting of the late *Amos Ogden*.

The witnesses speak of the verbal declarations of the late *Amos Ogden* of his affection for his niece *Nancy;* of his intention to give

her a marriage portion; to bestow upon her some of his property, or to provide for her in some way or other; and some of the proofs describe a contract essentially different from that deduced from the letter. But the plaintiffs cannot be allowed to use the letter as evidence of a contract in connexion with a part only of the verbal testimony, rejecting the rest. The whole must be taken together; and then the verbal proof, instead of sustaining, materially differs from and falsifies the terms of that contract, which it is contended is shewn by the letter.(*a*)

The bill rests the plaintiff's pretensions upon the ground, that the late *Amos Ogden* induced *John W. Ogden* to marry *Nancy* by a promise, that he would give her twelve thousand dollars as a marriage portion; and refers to the letter of the 22d of May, and certain other circumstances, as evidence of that promise. The defendant *Amos Ogden* admits, that the copy exhibited is in the handwriting of the late *Amos Ogden;* but all the defendants positively deny having any knowledge whatever of any such *promise* or *inducement* to the marriage as is charged in the bill. None of the defendants have, in their answers, relied upon the statute of frauds; but it has been mainly insisted upon by them, in argument, at the hearing.

The statute of frauds, so far as it is applicable to this case, is expressed in these words:—"No action shall be brought whereby to charge any person, upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."(*b*)

This clause was at one time supposed to embrace mutual promises to marry, but that notion has long since been abandoned, and it is now held to extend only to agreements to pay marriage portions, or to such cases as the one now under consideration.(*c*) The word "agreement," it has been settled, must not be loosely construed, but be taken in its proper and correct sense, as signifying a mutual contract on consideration between two or more parties; the whole of which, the *consideration* as well as the *promise*, must be in writing.(*d*)

(*a*) Cooper *v.* Smith, 15 East, 103.—(*b*) 29 Car. 2, c. 3, s. 4.—(*c*) Harrison *v.* Cage, 1 Ld. Raym. 387.—(*d*) Wain *v.* Warlters, 5 East, 10; Stadt *v.* Lill, 9 East, 348; Randall *v.* Morgan, 12 Ves. 74.

In cases of this kind the defendant may be compelled to answer fully to all the material allegations of the bill, whether he insists upon the benefit of the statute of frauds or not. But, if the statute is relied on, there can be no decree for the plaintiff, although the parol agreement should be admitted by the answer; and, consequently, to obtain relief, in such case, the plaintiff must either prove an agreement completely in writing, or such a part performance of the parol agreement admitted by the answer, as will take the case out of the statute. But if the defendant does not say any thing about the statute, then he must be taken to have renounced the benefit of it.(*e*)

The sole question is, then, whether the late *Amos Ogden* did sign an agreement in writing in consideration of this marriage, binding himself to give his niece *Nancy*, a marriage portion of twelve thousand dollars as is alleged; or whether there has been such a part performance as should induce the court to enforce a compliance with any parol agreement to that effect.

Marriage alone is not considered as a part performance of a contract of this nature;(*f*) yet if a person writes a letter promising to give a fortune with his daughter or niece to a man if he should marry her; and, under the encouragement of the letter, the man does marry her, he shall recover; the agreement having been executed, as far as it could be, on his part.(*g*) And such a letter addressed to the father, or a friend of the man, on his behalf, will be as obligatory as if addressed to the man himself.(*h*) But here, as no parol agreement has been admitted or proved, it will be unnecessary to say what should be deemed a binding partial performance of a contract in consideration of marriage.

The whole of this case rests upon the letter of the 22d of May, 1817. If that cannot be considered as an agreement within the meaning of the statute of frauds, there is an end of the case. The cases in which letters have been considered as constituting such an agreement, have gone fully as far, perhaps farther, than a just construction of that statute will warrant. They all, however, go upon the principle, that the court must be satisfied by a fair interpretation of the letters, that they import a concluded agreement; or afford sufficient materials for a more formal agreement.

(*e*) Whitchurch *v.* Bevis, 2 Bro. C. C. 567; Cooth *v.* Jackson, 6 Ves. 37; Blagden *v.* Bradbear, 12 Ves. 471; Rowe *v.* Teed, 15 Ves. 375.—(*f*) Taylor *v.* Beech, 1 Ves. 297.—(*g*) Seagood *v.* Meale, Prec. Cha. 560.—(*h*) Moore *v.* Hart, 1 Vern. 201; Welford *v.* Beezely, 1 Ves. 6; S .C. 3 Atk. 503.

But if it be reasonably doubtful, whether what passed was only a treaty, let the progress towards the confines of an agreement be more or less, or if it be doubtful, whether the language used was intended as expressive of an agreement, the court will not decree the specific performance of that which appears doubtful as a contract.(*i*)

But this letter is deficient in almost every substantial particular. It is not a promise in any sense. The writer speaks of circumstances which *have* occurred; of a marriage then contemplated; of what he intended to do; and of the manner in which he meant to dispose of his property. But there is not the least intimation that he had brought about the courtship, or had encouraged *John W. Ogden* to marry his niece by any promise of a fortune with her. He does not undertake, agree, or oblige himself to give any thing. He tells his brother what he means to do, should the marriage take place; but he binds himself to nothing; every thing is reserved entirely within his own power.(*j*) The plaintiffs had resolved to marry before this letter was written; therefore, even supposing it had been shewn to *John W. Ogden*, it could not have been the inducement upon which he addressed and became engaged to marry *Nancy Ogden*. Whatever were his hopes and expectations, they existed prior to, and independently of this letter; they could not have arisen in any respect from it.(*k*) There is no proof, that the late *Amos Ogden* had induced the plaintiffs to entertain any hopes or expectations of his bestowing any thing upon them in consideration of their marriage. After they had become engaged, he then expressed his entire approbation, and he then formed his liberal determination; but there is no proof that he himself communicated it to them prior to their engagement. And in his letter to his brother, there is nothing which gives to that determination the character of a contract.

Being perfectly satisfied upon these grounds, that the plaintiffs have not established such a case as to entitle them to any relief whatever, I deem it wholly unnecessary to say any thing in relation to the doctrine of satisfaction and election; or how far the devise to *John W. Ogden* and his wife, and their having actually elected to take under the will, is to be considered as a satisfaction and election in bar of their claim; since it is my opinion

(*i*) Huddleston *v.* Briscoe, 11 Ves. 583; Stratford *v.* Bosworth, 2 Ves. & B. 341; Allen *v.* Bennet, 3 Taunt. 173.—(*j*) Randall *v.* Morgan, 12 Ves. 67; Morison *v* Turnour, 18 Ves. 175.—(*k*) Ayliffe *v.* Tracy, 2 P. Will. 65.

that the testator had not bound himself to them by any contract whatever.

Whereupon it is *decreed*, that the bill of complaint be, and the same is hereby dismissed with costs, to be taxed by the register.

REBECCA OWINGS' CASE.

A person who is actually *non compos mentis*, but who has not been found to be so under a writ *De Lunatico Inquirendo*, may be permitted to sue, as co-plaintiff, with another; who may be treated as his committee, and required to give bond to account for any money directed to be paid to him for the use of the lunatic.

The granting of a writ *De Lunatico Inquirendo* is, in some measure, discretionary with the Chancellor; and may be dispensed with for good cause for the benefit of the lunatic.

Although the court cannot *dispose* of the person, or estate of a citizen who is a lunatic, without his having been found to be so by a regular inquisition; yet it may, under particular circumstances, extend its *protection* to his person or estate, without any such previous inquest.

A charge of an annual sum upon lands, for the support of a lunatic, though not a rent, is an incumbrance, following the estate, the prompt payment of which may be enforced, either as against the person, or personal property of the holder, or by putting a receiver upon the estate.

This bill was filed, on the 3d of September, 1819, in Baltimore County Court, by *Rebecca Owings* and *John Cromwell* and *Urath* his wife, against *William Owings*, to recover an annual sum of money given to *Rebecca*, by the will of her father. After the defendant had answered, and testimony had been taken, the case was removed to this court, under the act of 1824, ch. 196; and the papers were filed here, on the 9th of February, 1827. Some time after which it was brought before the court; and, on the 9th of June, 1827, the case was referred to the auditor to state an account of the amount then due to *Rebecca Owings*. The auditor made and filed his report accordingly, on the 14th of June. The circumstances of the case are sufficiently stated by the Chancellor, in delivering his opinion.

15th June, 1827.—Bland, *Chancellor*.—This case standing ready for hearing, the solicitors of the plaintiffs having been heard, and no counsel appearing for the defendant, the proceedings were read and considered.

It appears, that the late *Samuel Owings* left, at the time of his death, a large estate, consisting of real and personal property; and,

among others of his children who survived him, are two of the plaintiffs, *Rebecca* and *Urath*, and the defendant *William*. His daughter *Rebecca* being unable, by reason of her mental imbecility, to take care of herself, he made for her a special provision by his will, in connexion with the devise to his son *William;* to whom he gave a large portion of his real estate. "To hold the same," (these are the words of this testator,) "to him the said *William Owings*, his heirs and assigns, for ever, upon these express conditions, that he and they, or the person or persons to whom the estate devised to the said *William Owings*, may eventually pass, maintain my daughter *Rebecca*, or pay sixty pounds current money a year for her maintenance during her natural life." This will bears date on the 7th of May, 1803, and the testator must have died soon after, although it is not stated when; because it appears to have been proved on the 25th of June, in the same year.

Rebecca, after the death of her father, continued to reside with her mother, the late *Deborah Owings*, until her death, which happened in December, 1810; and was taken care of and altogether maintained by her. The late *Deborah*, under an apprehension that the provision made by *Rebecca's* father for her maintenance, might not be regularly applied, or that it might be inadequate, by her will, also made provision for her support. After some specific legacies, she gives all the residue of her estate to her eight daughters by name, including *Rebecca*, to be equally divided; and then says:— "It is my will and desire, that the portion of my estate, above bequeathed to my daughter *Rebecca* shall, so soon as convenient after my decease, be laid out by my executors, herein after named, in the purchase of bank stock; and the said stock, when so purchased, shall be held in the name of my said daughter *Rebecca*. And I do hereby authorize and empower my daughter *Urath Cromwell* to demand and receive the interest or dividends arising from the said bank stock, and to apply the same to the support and maintenance of my said daughter *Rebecca* during her natural life; it being understood, that my said daughter *Rebecca* is to be removed to the house of my said daughter *Urath Cromwell*, and from and after the decease of my said daughter *Rebecca*, I do give and bequeath the bank stock aforesaid unto my said daughter *Urath Cromwell*, as a compensation for her trouble in providing for and taking care of my said daughter *Rebecca*." After the death of this testatrix, *Rebecca* went to reside with the plaintiffs, *Cromwell*

and wife, by whom she has been taken care of and maintained ever since.

The bill does not introduce *Cromwell* and wife as the *next friends* of *Rebecca*, but merely in the character of co-plaintiffs; and then states, "that *Rebecca* being, by the providence of God, gifted from her birth with but a small share of reason and judgment, and incapable, of herself, without the help and kindness of her friends, to take care of herself, or to manage and dispose of property." But it is not alleged, nor does it appear, that she has, by any judicial proceedings, been found to be a person of unsound mind, or *non compos mentis*. Nor do the plaintiffs *Cromwell* and wife show, or claim any interest whatever in the matter in controversy.

All these facts are admitted by the defendant; and he also admits, that he has never, at any time, maintained, or paid any thing towards the maintenance of *Rebecca*. But he alleges, that he has always been ready and willing to maintain her, when called upon; and, that he would have done so, if he had been permitted. The acquittance from his mother, which he has exhibited, and seems to place some reliance upon, may be at once laid aside as having no material bearing upon this case.

The plaintiffs, by their bill, pray specially, that the defendant *William Owings* may be compelled to pay to *John Cromwell* and *Urath* his wife, for the use and benefit of the said *Rebecca Owings*, whatever may be now due, or may hereafter become due to her under her late father's will: and generally, that the plaintiffs may have such other relief as may be agreeable to equity and right.

Thus it appears, that justice is demanded in behalf of one of that unfortunate class of persons who are held to be most peculiarly under the guardianship of this court. The case is of a delicate and anomalous nature; yet it is one in which, it is quite evident, that relief, by some means or other, ought to be granted. There are, however, difficulties in the way, which must be overcome or removed.

The first of them which presents itself, is as to the parties. If all those who have an interest in the subject, and who ought to have been brought before the court, have not been made parties, it may be taken advantage of by demurrer, by plea, or at the hearing. On the other hand, if a person be made a defendant unnecessarily, the bill may be dismissed as to him, and proceed as to the others.(*a*)

(*a*) 2 Mad. Chan. 174.

The predicament of this case is different. The right is admitted to be exclusively in one only of the plaintiffs; and the special prayer is, that the relief may be decreed to the two, who have no interest, for the use of the one who has the right. *Cromwell* and wife, it is clear, can have none, or a very remote interest in the matter now in controversy. The care of *Rebecca's* person was commended to them by the last will of her mother. But it is not even intimated, that they have been thus clothed with the character of her testamentary guardians; and there is in fact not the least foundation for their assuming any such office. They are not the *prochein amys* of *Rebecca*, because they do not so present themselves; nor do they state her to be an infant, *feme covert*, or lunatic; or to be in that situation in which they would be authorized to accompany her into court as *prochein amys*. It may be inferred from what is said in one of the books of practice, that a lunatic may sue by *prochein amy*;(*b*) the expressions of the compiler are, however, unwarranted, in that sense, by any adjudged case whatever. But according to the loose proceedings of the Land Office, it seems, that a warrant of resurvey was obtained by his next friend for the benefit of one who was then *non compos mentis*, although not found to be so by inquisition.(*c*) A lunatic, that is, one who has been found and returned to be *non compos mentis*, can only sue by his *committee*.(*d*) *Rebecca* has not been judicially declared a lunatic; and consequently she can have no committee by whom to institute any suit.

It follows, therefore, that if there are no other principles upon which *Cromwell* and wife may be associated in this suit with *Rebecca*, no relief can be granted upon this bill as it now stands, but it must be amended or dismissed.(*e*)

Generally and technically speaking, those only are called lunatics who have been so found and returned. Without an inquest and return thereon, no one can be judicially treated as a lunatic, and be debarred of his liberty, or have the management of his property taken from him. The power to divest a citizen of his personal freedom and of his property is one of a most extraordinary and delicate nature; and should, therefore, never be exercised without observing every precaution required by the law. But, although this court will, in no case, undertake to go all lengths;

(*b*) 1 Harr. Pra. Chan. 773.—(*c*) Land H. A. 150.—(*d*) 2 Mad. Chan. 175; 1 Harr. Pra. Chan. 762.—(*e*) The King of Spain *v.* Machado, 4 Russ. 225.

and to confine or dispose of the person of any one, as a lunatic, until he has, upon solemn inquisition, been found to be *non compos mentis;* yet it will grant relief and protection to such persons without and previous to their being adjudged to be *non compos.* On a proper application, the granting of a writ *de lunatico inquirendo* is generally a matter of course; but still it is discretionary. If the Chancellor sees, that the interests of the subject of it, may be promoted, or his health benefited by withholding or suspending it, he may do so. The object of the Chancellor's authority in matters of lunacy is to protect and take care of citizens, who are intellectually unfortunate; hence, it has been always so exercised as most effectually to attain that object.(*f*) If the execution of a commission of lunacy would in all probability have a tendency to confirm the lunatic in his insanity; or if his estate or income is too small to defray the expense of its execution; or if the object in view may be attained as safely and as fully in all respects without it; the execution of the inquisition may be suspended or dispensed with altogether. In short, there are many instances in which the court will recognise and act upon the fact, that a person is in a partial or complete state of insanity, without requiring that fact to be established by a return to a writ *de lunatico inquirendo.*(*g*)

I am of opinion, that this may be considered as one of those instances. The pension given to *Rebecca* by her father is not more than sufficient for her comfortable maintenance; there is none to spare. It should certainly not be involved in any expense that can be avoided. The court is now only called on to enforce its payment and application; which may be as safely done now as after an inquisition has been taken; and certainly with more advantage and economy to *Rebecca.* I shall, therefore, proceed without requiring *Rebecca* to be formally declared a lunatic, and a *committee* of her person and estate to be appointed.

It is stated and admitted, that the plaintiff *Rebecca* is, in fact, so far insane as to be incapable of managing her property. Her late parents have made a provision for her maintenance. But to order the property they gave her to be paid into her *own hands* would not be extending to her proper and adequate relief and pro-

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(*f*) *Ex parte* Tomlinson, 1 Ves. & Bea. 57; Brodie *v.* Barry, 2 Ves. & B. 36.
(*g*) Sheldon *v.* Aland, 3 P. Will. 111, note; Lord Donegal's case, 2 Ves. 408; Machin *v.* Salkeld, Dick. 634; Bird *v.* Lefevre, 4 Bro. C. C. 100; Eyre *v.* Wake, 4 Ves. 795; *Ex parte* Cranmer, 12 Ves. 446; Wartnaby *v.* Wartnaby, Jac. Rep. 377; 1 Mont. Dig. 39; Shelf. Lun. & Idiots, 436.

tection; or rather it would amount to an absolute frustration of the good intentions of her parents. The relief must, therefore, be so conducted as to accomplish the object in view; that is, the maintenance of *Rebccca*. This cannot be done without the instrumentality of a trustee, who may be charged with the receipt and application of the fund that has been appropriated for that purpose. One of her provident parents has made a selection of trustees for her; which, so far, seems to be conceded to have been a judicious one. I shall, therefore, confirm and act upon it. Not because I recognise the least right in the late *Deborah Owings* to appoint a trustee or guardian of the person or property of her daughter; but, because I believe it to be my official duty to protect persons in the condition in which I find *Rebecca;* and to do so effectually, I must appoint and use a trustee or agent. And *Cromwell* and wife having been recommended by one of the parents of *Rebecca*, (for so I consider what is said in the will of the late *Deborah*,) as suitable trustees; and they having assumed that character; with which, upon a proper application I might have clothed them; I shall now sanction and confirm it to them;—upon the ground that this court always retrospectively sustains and ratifies that which has been usefully and fairly done; and which it would have ordered to be done. I shall require *John Cromwell* to give bond for the faithful application of the money I shall decree to *Rebecca*, and order to be placed in his hands for her use.(*h*) And I shall accordingly regard this suit as having been instituted by *Rebecca Owings*, together with *John Cromwell* and *Urath* his wife as trustees of *Rebecca*, and thus pass over this first difficulty, as to the proper parties.

The next question is, what is the nature of the bequest of the late *Samuel Owings* to his daughter *Rebecca*? The defendant seems to have a notion, that his father gave him the right to take charge of the person of his sister, and to maintain her as he thought proper. But the devise conveys no such idea; and if it did, it is clear, that although a father may appoint a guardian of his *infant* children; yet he cannot dispose of the custody of his *adult* children whether of sound mind or *non compos mentis*, in any way whatever.(*i*) It is evident, however, that the testator had no reference to the custody or the place of residence of his daughter; his expressions show, that his thoughts were directed exclusively to her maintenance, in whatever place she might dwell. And that

(*h*) Bird *v.* Lefevre, 4 Bro. C. C. 100.—(*i*) *Ex parte* Ludlow, 2 P. Will. 635.

maintenance he endeavours to make as unalterably and imperishably certain as the nature of things would admit. His son *William* was to take the estate he gave him expressly upon the condition, that he maintained *Rebecca*. *William* has taken the estate; and, consequently, he has assumed this duty to *Rebecca*, and has become personally bound to her, in consideration of the estate he has thus taken and now enjoys. But this condition is not confined to *William Owings* personally and only; it is extended to "the person or persons to whom the estate may eventually pass." It is a condition, that runs with the land; and is a continuing charge upon it.(*k*) It is an incumbrance to which the land is liable in the hands of every one, (not having a better title than the devisor,) during the life of *Rebecca*. This charge upon the land devised to *William Owings* cannot be deemed a *rent* of any description; nor can it properly be considered as an *annuity;* because by an *annuity* the person alone is charged; no land is encumbered with it. But here the land is charged, and the person only *in respect* of the *enjoyment* of that land. This devise, therefore, has given to *Rebecca* a *particular* interest in the land.(*l*) It has imposed upon it an incumbrance, which follows it into the hands of *William* and every other holder during the life of *Rebecca*. It is a kind of legacy, the punctual payment of which this court will, and, perhaps, only can enforce.

It is then clear, that these plaintiffs are properly here; and that they ought to obtain relief: the mode in which it should be granted is the only remaining enquiry. Under the general prayer the court is left free to adopt any mode by which it can most readily and effectually administer that relief which the equity of the case demands. Where the relief asked is maintenance; a subsistance for one who is utterly unable to take care of herself; and it is determined to be equitably due; the court should, if practicable, leave no room to escape from or palter with its mandates. When helplessness is to be furnished with bread, the judgment which awards it should be clear, prompt, and easily enforced.

According to the common law, if a party brought his *writ of annuity*, and obtained judgment, that judgment stood as a security as well for the amount then due as for that which should thereafter

(*k*) The Mayor of Congleton *v.* Pattison, 10 East, 130; Powell's Case, Nelson, 202; Elliot *v.* Merryman, Barn. Ch. Rep. 82.—(*l*) Clark *v.* Ross, Dick. 529; Pow. Mort. 221, 1032; Co. Litt. 4, 122; West *v.* Biscoe, 6 H. & J. 460; Attorney General *v.* Christ's Hospital, 3 Bro. C. C. 165.

become due; and the payment of the future instalments might be enforced by *fieri facias* sued out within the year after every day of payment, though it might be many years after the judgment.(*m*) And in an action of debt upon a bond conditioned for the payment of certain sums of money on certain days by way of instalments; or upon a bill in equity for the arrears of an annuity; under a judgment for the penalty, or decree for the annuity, it was ruled, that the plaintiff should be allowed to levy by execution the sum found due at the trial; and that the judgment or decree should stand as a security for the future arrears, with liberty to apply from time to time to sue out fresh executions thereon.(*n*) So in this court, where alimony, or the payment of a certain sum annually had been decreed; the payments as they became due were enforced on petition and order in a summary way.(*o*) And where an estate has been mortgaged, the tenant for life in possession will be ordered to keep down the interest; and if he does not do so, a receiver may be put upon the estate with directions to take, and apply the rents and profits to the interest as it becomes due on the mortgage, and to pay the surplus to the tenant.(*p*)

Upon these suggestions and analogies, I shall decree, that *William Owings* forthwith bring into this court, or pay to the plaintiff *John Cromwell*, the whole amount now due, with interest on each annual sum as it became due until brought in or paid; and let the decree stand as a security for what may hereafter become due. The payment of the several sums, as they may hereafter become due, may, on petition, be enforced by a summary proceeding, either as against the person or personal property of *William Owings;* and should he fail to pay the whole amount now decreed, or which may hereafter become due, I may be induced, on a proper application, to put a receiver upon the estate devised to him, with authority to take and apply the rents and profits of it under the directions of the court.

The devise gives sixty pounds *a year;* but does not distinctly say from what date it is to be computed. This charge, from its nature, should take effect from the day of the death of the testator;(*q*) but as the date of that event has not been clearly shewn, I shall direct the years to be reckoned from the 25th

(*m*) 2 Inst. 471; Gilb. Exec. 12.—(*n*) Ridgely *v.* Lee, 3 H. & McH. 94; Marshall *v.* Thompson, 2 Mun. 412; Sparks *v.* Garrigues, 1 Bin. 152; Ranelaugh *v.* Hayes, 1 Vern. 190.—(*o*) Darne *v.* Catlett, 6 H. & J. 476; Hewitt *v.* Hewitt, ante, 101. (*p*) Pow. Mort. 300, note.—(*q*) 2 Mad. Chan. 83.

of June, 1803, the day on which the testator's will was authenticated.

Whereupon it is *decreed*, that the report of the auditor be confirmed; that *William Owings* forthwith pay, or bring into this court to be paid unto *John Cromwell*, for the use of *Rebecca Owings*, the sum of $6476 91, together with legal interest on $3834 67, part thereof, from the 13th day of the present month, until brought in or paid; that *John Cromwell* and *Urath* his wife are hereby appointed trustees of the property of *Rebecca*, with full authority to demand, receive and apply the same towards her maintenance and for her benefit, under the directions of this court; which property and money they shall deliver up, pay or bring into court, as may be required; and they shall render an account thereof on oath to this court from time to time, at least once in each and every year during the life of *Rebecca*, or until the further order of this court; that *John Cromwell*, before he and the said *Urath* his wife shall enter upon the duties of this trust, give bond to the State, in the penalty of fifteen thousand dollars, with surety to be approved by the Chancellor, for the faithful performance of the trust reposed in them by this or any future decree or order in the premises;—and that the defendant pay to the plaintiffs their full costs, to be taxed by the register.

Upon the application of the plaintiffs a *fieri facias* was on the 3d of April, 1828, ordered in general terms on this decree, but it does not appear that it was ever executed or returned. On the 6th of January 1830, *John Cromwell*, one of the plaintiffs, by his petition stated, that *Rebecca Owings* died on the 19th of August 1828; that he had maintained her in his house, with every comfort, during eighteen years prior to her death; and had often attended her in his professional character of a physician; that he had expended considerable sums of money in fees to lawyers, and costs of suit in defending her rights and interests; and that no part of the amount decreed to her had been paid. Upon which he prayed, that the whole amount of his account might be ordered to be paid out of the sum of money so decreed to the late *Rebecca Owings*.

12*th January*, 1830.—Bland, *Chancellor*.—The sum decreed to the late *Rebecca Owings* should have been paid to her trustees as directed by the decree; but that not having been done, as is alleged by this petitioner, and the case having abated by the death of *Rebecca*, it must be regularly revived before the decree can be

enforced for the benefit of any one. On the death of *Rebecca* all the rights and authority of the petitioner *John Cromwell*, as trustee, immediately ceased for every purpose whatever; except that of closing his accounts and delivering over the property, if any, in his hands, to the legal representatives of *Rebecca*. But it does not appear, that this petitioner, who was appointed by the decree as the trustee of *Rebecca*, ever gave bond or qualified as required.

The case was afterwards revived and the amount ordered to be paid to *John Cromwell*, which order on appeal was affirmed, and so the case was closed.

CUNNINGHAM *v.* BROWNING.

The manner of obtaining a patent grant for land. The objects of an inquest of office; the cases in which it is required; and the mode of proceeding by *caveat* to prevent the emanation of a patent in England and in Maryland.

The origin of the Land Office, considered as a branch of the Chancery Office; the jurisdiction of the Judges of the Land Office, under the Proprietary Government, and of the Chancellor, at present, in relation to proceedings in the Land Office.

The five several kinds of Land Warrants.

The first designation of the land aimed at by one who wishes to purchase from the State, from the date thereof, by a special warrant in the Land Office, or by a special location on the surveyor's book, or by a certificate of survey, gives an incipient title against all others.

The right thus acquired is not an equitable interest; but an imperfect legal title, which, when completed, by a patent grant, is considered as a legal title, by relation from the date of the incipient title.

A special warrant, or a special location, to be deemed an incipient title, must so describe a space or area of land, as to distinguish it from all other tracts.

It appears that *James Cunningham*, as assignee of two common warrants, on the 31st of October, 1826, placed them in the hands of the surveyor of Allegany county for execution; who on that day, in pursuance of the rules and orders established by the governor and council, noted down in his book the receipt of them, and designated the place at which *Cunningham* desired to have them located, in these words: "I hereby locate the within warrants for *James Cunningham* at a large spring on the west side of the North Fork of the Little Crossings, and near a large oak tree, marked J. C.; and adjoining the south corner of lot number 2370." By virtue of these warrants, on the *third* day of November following, the surveyor laid out and surveyed a tract of land for *Cunning-*

ham, containing two thousand four hundred and eighty acres and one-half acre, to be held by the name of *Cheviot Dale*. The certificate of survey was returned to the Land Office on the 8th of January, 1827, and on the same day the caution money was paid.

On the *first* day of November, 1826, *Meshak Browning* obtained from the Land Office, a special warrant for two hundred and ten acres of land, lying in Allegany county, in which warrant the description of the location of the land is expressed in these words: "On or near the head of the North Fork of the Little Crossings, and at the large spring, called *Browning's Spring*, and also near a place called *Patke's Pane*, and near the foot of the Meadow Mountain." By virtue of this warrant the surveyor says, in his certificate, bearing date on the *fifteenth* day of the same month, that he had surveyed a tract to be held by the name of *Browning's Hunting Ground*, containing two hundred and ten acres, the location of which he thus describes: "Beginning in the centre between two bounded sugar-trees near the head, and on the west side of the North Fork of the Little Crossings, and south twenty-six degrees and three-fourths of a degree, west about eight perches from the head of a large spring, called *Browning's Spring*, and south five degrees and one-half degree, east about eight and one-half perches from a large white-oak tree marked J. C., and running thence north sixty-three and one-fourth of a degree, east forty-five perches to a bounded hemlock tree standing at the Panthers' Pen, north sixty-nine degrees;" and so on, describing a tract lying in the form of a narrow oblong figure, in about the middle of the one side of which are found the several marks which denote the place of beginning. This certificate was returned to the Land Office on the 23d of March, 1827, and on the same day the caution money was paid.

On the third day of April following, a *caveat* was entered upon this certificate of *Browning's* by *James Cunningham*. An order was passed appointing a day for hearing, authorizing the parties to take testimony before any justice of the peace, on giving notice as usual, and directing the surveyor to lay down and return a plot of the lands. Under this order a plot was accordingly returned, upon which the pretensions of both parties were laid down without any counter location from either; from which it appears that *Browning's Hunting Ground* extends entirely across *Cheviot Dale*. Some depositions were also taken and returned; but, as they develope nothing of any importance, it is deemed unnecessary to state the facts proved by them.

20*th June*, 1827.—Bland, *Chancellor*.—This *caveat* standing ready for hearing, and the argument of the caveator's attorney having been heard, and the notes of *Browning's* counsel having been read, the proceedings were thereupon read and considered.

The Chancery Court of England has always been considered as the prototype of that of Maryland; and, that the one has been in fact the exemplar of the other, in almost every respect, might be shewn by a comparison of the various offices, powers, and jurisdictions of each of them. The chancery of Maryland, as well as of England, was originally resorted to as an *Officina Brevium*. In cases of *scire facias*, to repeal letters patent, and in some others, in which the Chancellor sits as a court of common law, his authority is substantially the same in Maryland as in England. As mere courts of equity, there is scarcely any difference between the Court of Chancery of Maryland, and that of England. And the form of proceeding by *caveat*, according to which the Chancellor is now called upon to act, is one which has been derived from the chancery of England; and is regulated by forms and principles similar to those by which the English mode of proceeding by *caveat* is governed. It may be well, therefore, for the better understanding of this, and all similar cases, briefly to review the mode of obtaining a patent grant for land in England, and in this State; and the general doctrine in relation to *caveats*, before the merits of the case, now before the court, are taken up, considered and determined.

The king of England being invested with a limited sovereignty over the realm, all public property belongs to him in that capacity; and all lands are said to be held directly or indirectly of him. The king is also invested with authority to create corporations, to grant franchises, and to dispose of any lands, or public property, at his pleasure. Anciently, a large proportion of the king's revenue arose from lands granted by him; as to which the Chancellor and Treasurer had checks upon one another. The Chancellor made out all patents for lands; for, no real estate was to be parted with by the crown without the great seal; but then the rents of such tenures were to be accounted for before the Treasurer.(*a*) The granting of a franchise, or of any estate of inheritance in lands, could only be done by a regular patent under the great seal, specifying particularly the franchise, or estate granted. But the same degree of

(*a*) Gilb. Exch. 9, 10.

solemnity and caution was not required in disposing of all other things; for, the king might dispose of a chattel under his privy seal; or he might make a lease for years of any crown lands without a patent under the great seal.(*b*)

But, after any land had been once legally granted by the king, it could, in no case, be fully and particularly revested in him, so as again to become the subject of a new patent to an individual, without office found, or something equivalent to an inquest of office; for it is said to be a part of the liberty of England, that the king's officers should not enter upon other men's possessions, till a jury had found the king's title. Therefore, where the king's title appeared on record, his officers might enter without any office found; as where the lands were held of the crown and the tenant died without heirs, the officers of the king might enter; because the tenure whereby the king's title appeared was upon record. So by the common law, where lands belong to nobody, the king's officers may enter; because by the law, the land is in the crown; for the law entitles him where the property is in no man; but if any body else were in possession, the lands could not be divested without matter of record. There are two kinds of offices, one an office *entitling*, that vests the estate and possession of the land in the king where he had but a right or title before; and another called an office of *instruction*, and that is when the estate of the land is lawfully in the king before, but the particularity of the land does not appear of record. And therefore, although, where the king is entitled by matter of record, there is no need of an office to entitle him; yet there was always an office of *instruction* found, in order that the land might be distinctly ascertained and specified; for until that was done, although the title was in him, he was prohibited, by statute,(*c*) from making any grant of them to an individual. And therefore, in all cases, where it is proposed to place any lands, which had been held by an individual whose right had been confiscated or forfeited; or whose estate was escheatable, because of its being such as he was incompetent to hold; or whose title had escheated, because of his death intestate without heirs, it was deemed necessary to have the facts found by an inquest of office taken under a commission, or a writ of escheat, a *diem clausit extremum*, a *mandamus*, a *melius inquirendo*, or the like; or by an inquest of office taken by the escheator

(*b*) Gilb. For. Rom. 12.—(*c*) 8 H. 6, c. 16, and 18 H. 6, c. 6.

in virtue of his office.(*d*) But it not unfrequently happens, that the king's title to lands, which has thus accrued to him by confiscation, forfeiture or escheat, remains wholly unknown to the public officers whose duty it is to have it distinctly and specially replaced in his hands by an inquest of office; therefore, in such cases, where an individual by petition to the king *first* makes known the fact, that there is such an interest; and prays some reward upon the ground of discovery, if it can be made out; the proper proceedings are thereupon instituted; and if the escheat be established, the petitioner is usually rewarded with a lease of the property for his discovery.(*e*)

Considering the numerous and various matters of public concern by which the attention of the king is presumed to be unceasingly engaged; in order to prevent mistake, imposition and fraud, it is provided, that all his grants must pass through certain preliminary grades and forms. The proposed grant is by a warrant from the crown first put into the form of a bill by the attorney and solicitor general, which is then to be sealed with the privy signet by the principal secretary of state, and approved and signed by the king; it is then carried to the keeper of the privy seal, who makes out a writ thereupon to the chancery, which, if no objection be apparent, or then interposed, is a warrant to affix the great seal to the patent. Upon which it is enrolled, within the time limited by law, in the *Petty Bag* or the enrollment office, which appears to have originally constituted a part of the court itself, and which is, for all such purposes, a legal court of record.(*f*) But if before the great seal has been put to the patent the proposed grantee dies, the application so totally fails, that the whole proceeding must be revived, or renewed by the heir or person who succeeds to the pretensions of the applicant.(*g*) The object of all these several forms is, that the proposed grant may be narrowly inspected by all those officers whose duty it is to inform the king if there be any thing contained in it which is improper or unlawful to be granted; indeed, it is said to be the duty of all the king's subjects to see, that he is fully informed as to such matters.(*h*)

(*d*) Raysing's Case, Dyer, 208; Page's Case, 5 Co. 52; Doe Lessee of Hayne *v.* Redfern, 12 East, 96; F. N. B. 566, 569; 4 Inst. 225; Gilb. Exch. 103, 109; 2 Blac. Com. 244; 3 Blac. Com. 258; Shelf. Lun. & Idiots, 75.—(*e*) Moggridge *v* Thackwell, 7 Ves. 71.—(*f*) Vernon *v.* Benson, 9 Mod. 48; *Ex parte* Koops, 6 Ves. 599; *Ex parte* Beck, 1 Bro. C. C. 578; Attorney General *v.* Stewart, 2 Meriv. 153; 1 Mad. Chan. 4.—(*g*) 1 Boz. His. Mary. 258.—(*h*) Com. Dig. tit. Patent C. 5 & D; Bac. Abr. tit. Prerogative F.; 2 Inst. 555; Gilb. For. Rom. 12; The Case of Alton Woods, 1 Co. 52.

But those officers whose duty it is, thus carefully to examine and consider the nature of the proposed grant, before they pass it, cannot be presumed to know any thing more of it than what appears upon its face, or than what is represented to them by the applicant; and yet there may be a variety of circumstances, not so apparent, or disclosed, which, if made known, would clearly demonstrate the great impropriety and injustice of passing it. Hence, in all such cases, where the interests of a third person are likely to be materially affected by the granting of a patent, its emanation may be opposed by such third person; for, when the immediate possession of land is granted to two several persons, it begets suits and troubles, which the common law will not suffer in the king's grants under the great seal;(*i*) and therefore, to prevent such mischief, it is said, that there are three several stages at which the making out of a patent may be opposed; *first*, when it is under the consideration of the king; *secondly*, when it comes to the privy seal; and *thirdly*, by a *caveat* when it comes to the great seal.(*j*) This last appears to be the most formal and usual course.

In putting the great seal to a patent the Chancellor acts in his *legal* capacity; and therefore, in hearing and deciding upon any controversy which may arise, as to the propriety of passing a patent, he sits as a court of common law;(*k*) and so long as an application thus stands before the Chancellor for the great seal, he may indulge the parties with further time upon such terms as he may deem equitable and proper; but after the great seal has been once put to the patent, then all further control over it by the Chancellor in a summary way on a *caveat* ceases.(*l*)

A *caveat* in chancery is a petition or suggestion entered by the party, who supposes himself likely to be injured by the granting of a patent, respectfully cautioning the Chancellor not to put the great seal to the instrument until the applicant has been called upon to make out a proper case for his patent; and, also to shew cause, if any he has, why the objections thus made to its being granted should not be allowed. Upon which a day is appointed for the hearing, of which the applicant is notified; and in the interval the parties are allowed, if required, to take testimony in relation to any controverted facts. And at the hearing, the applicant for the patent, considered as a plaintiff, or as holding the affirmative of the

(*i*) The Case of Alton Woods, 1 Co. 50.—(*j*) 1 Mad. Chan. 18. 1 Chal. Opin. Em. Law, 55.—(*k*) 3 Blac. Com. 49.—(*l*) *Ex parte* Beck, 1 Bro. C. C. 578; *Ex parte* Koops, 6 Ves. 599.

matter thus put in issue, is allowed to open and conclude the argument. After which the Chancellor may overrule, or allow the objections; from which there is no appeal: but no costs are given if the *caveat* be not unreasonable.(*m*) If the objections are overruled the *caveat* is discharged, and the great seal is at once put to the instrument, and the grant is thus perfected and issued; but if the Chancellor sustains the objections, he then withholds the great seal, and represents the whole matter to the king; who may nevertheless order a patent to be issued or not at his pleasure.(*n*)

The charter of Maryland gave to the lord proprietary an absolute right of soil to all the territory comprehended within its specified boundaries; and constituted him *vice-roy* over the province. Thus clothed with an unqualified title to all the lands, and a limited, yet large extent of sovereignty over the projected State, he commenced the settlement of the country in March 1634;(*o*) and, as might have been expected, from the nature of things, the parcelling out and sale of lands called for his earliest attention. It appears accordingly, that among the first things done by the proprietary, was to adjust and publish the terms upon which he proposed to dispose of his lands, and the manner in which an individual might obtain a legal title to any specified quantity he might want; but of those terms, or conditions of plantation, it will here be unnecessary to say any thing further, in regard to original grants from the proprietary, than that lands were given to emigrants as an encouragement to their coming into and settling the country; or they were sold at a low, but stipulated price payable in money. But, large quantities of land, after having been thus alienated, were continually reverting to the proprietary, considering him merely as

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(*m*) *Ex parte* Fox, 1 Ves. & Bea. 67.

(*n*) Leighton's Case, 2 Vern. 173; *Ex parte* O'Reily, 1 Ves. jun. 112; 1 Chal. Opin. Em. Law, 152; *Ex parte* Beck, 1 Bro. C. C. 578; Slingsby's Case, 3 Swan. 178, note; 1 Mad. Chan. 18; 1 Hal. Con. Eng. 489, note; 2 Virg. Stat. 523, 531, 537.

The process of obtaining a patent for a new invention; and the mode of preventing the emanation of such a patent, in England, by a *caveat*, is substantially similar to that here described. *Westm. Rev. Jan.* 1835, *art.* 12. It would seem, that, under the colonial government as well as since the revolution, the exclusive right to a new invention could only be secured to the inventor by a special act of the legislature, 1 *Virg. Stat.* 374; 1784, *ch.* 20; 1786, *ch.* 23; *April* 1787, *ch.* 21, as the English statute of monopolies, 21 *Jac.* 1, c. 3, did not extend to the colonies, 1 *Chal. Opin. Em. Law*, 202. But this matter now belongs to the government of the United States, and has been regulated by the acts of Congress of the 21st February, 1793, ch. 11, and 15th February, 1819, ch. 19.

(*o*) 1 Boz. His. Mary. 274; Land Ho. Ass. 13, 64, 255; Cassell *v.* Carroll, 11 Wheat. 134, 170.

one of the contracting parties; because of the purchasers failing to comply with the conditions of plantation on their part; or the lands which had been so disposed of by the proprietary were returned to him by forfeiture or escheat.

By several proclamations of the proprietary, the first of which was published in November 1725, it was made an express condition of all future contracts between himself and the purchasers of his lands, that the purchaser should, after the survey, pay the whole purchase money and take out a patent within two years from the date of the warrant; or, on his failing to do so, he should forfeit the imperfect title he had so acquired, if any one should thereafter discover the fact, and take out a warrant, and obtain a patent thereon for the same land; who as a reward for his discovery was allowed a warrant on the payment, at the time, of one-tenth of the amount of the composition money then due, and the remaining nine-tenths on the return of the certificate.(*p*) This may be regarded as a kind of escheat; and the power of the proprietary, in such cases, to make a new disposition of the land as being thus, according to the terms of the contract, restored to him by operation of law without any inquest of office whatever; for the contract between the proprietary and the then immediate purchaser and holder, being upon record, was considered as equivalent to an inquest of office.(*q*)

But where, after the whole legal estate in fee simple had passed out of the proprietary, the individual owner had, by being convicted of a crime, forfeited his estate; or where the lands which had been so granted had, by the death of the owner intestate and without heirs, escheated, it seems to have been deemed necessary, during the earlier periods of the proprietary government, here, as in England, to have the fact of such title and of the nature and extent of the lands ascertained by an inquest of office before the same lands could be again disposed of by the proprietary. The first settlers being, for the most part, poor adventurers, it often happened, that they died intestate without leaving any *known* heirs; and, therefore it was, that, for many years after the settlement of the country, cases of escheat for want of heirs were so very frequent.(*r*) The inquests in all such cases, although there was at one time an escheator,(*s*) were ordered to be taken here, as

(*p*) Land Ho. Ass. 319, 462, 469; 1795, ch. 88, s. 10.—(*q*) Land Ho. Ass. 186; Gilb. Exch. 89; 1 Chal. Opin. Em. Law, 150.—(*r*) Land Ho. Ass. 154, 245.—(*s*) Land Ho. Ass. 224.

in England, by a writ of *mandamus*, or a *diem clausit extremum*, directed to the sheriff of the county in which the lands lay; upon the return of which, as a reward to the discoverer, at whose instance the *mandamus* had been issued, he was allowed to have the pre-emption of the land so escheated at two-thirds of its value, or that it should be sold, and one-third of the proceeds of sale paid to him.(*t*)

But, in that interval of time, between the years 1692 and 1715, when the government of the province was taken into the hands of the king, although the proprietary's right of soil was admitted, it was yet found difficult, or impracticable to have any such inquests of office executed for his benefit, and as a safeguard to the rights of the citizen; and therefore, during that time, his agents issued warrants, and made out grants for all escheated lands without any previous inquest. After the government was restored to the lord proprietary, the granting of escheated lands without any previous inquest of office was still continued;(*u*) and this practice having been followed up in the same way ever since, under the State government, the holding of an inquest of office in any such case must now be considered as having been thus virtually abolished.(*v*) He who discovers the escheat and sues out an escheat warrant, is entitled, as formerly, to have a patent for the land on paying two-thirds of its value; which value, instead of being ascertained, as formerly, by inquest, is now estimated and returned by the surveyor under his oath of office.(*w*) It has been laid down since the revolution, that the State, as to the lands of the proprietary, stands in his place; and that they remained subject to all claims and rights created and acquired under the proprietary;(*x*) and further, that by the acts of confiscation, passed during the revolutionary war, all British property was seized and vested in the State without office found.(*y*)

What is here said, in regard to inquests of office, must however be understood as applying only to cases where the lands of a citizen have escheated on his death intestate without heirs; for

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(*t*) Land Ho. Ass. 102, 114, 174, 194, 261, 283, 319; Lord Prorietary *v.* Jenings, 1 H. & McH. 119; Kilt. Rep. 11 Ed. 3, c. 8, & 8 H. 6, c. 16; Land Records, lib. C. B. 13, &c.; Chan. Pro. lib. C. D. 78; lib. P. L. fol. 90; lib. J. R. fol. 242, &c. (*u*) Greaves *v.* Dempsy, 1 H. & McH. 65; Lord Proprietary *v.* Jenings, 1 H. & McH. 119, 138; Thomas *v.* Wootton, 4 H. & McH. 428.—(*v*) Land Ho. Ass. 160, 162, 176; Owings *v.* Norwood, 2 H. & J. 96.—(*w*) Land Ho. Ass. 319, 435, 438; 1800, ch. 70. (*x*) Land Ho. Ass. 300; Ringgold *v.* Malott, 1 H. & J. 317.—(*y*) Land Ho. Ass. 301, 332; Ringgold *v.* Malott, 1 H. & J. 317; Owings *v.* Norwood, 2 H. & J. 96; Hall *v.* Gittings, 2 H. & J. 112.

as to an alien, it has been held, that his title, which he has acquired by purchase, is good against every body but the State, and cannot be divested without office found;(z) although it would seem, that, as regards the interests of creditors, it may be considered as having devolved upon the State without any previous inquest of office.(a) It is now unnecessary to say any thing of forfeited lands, of which it was formerly made the duty of surveyors to give notice,(b) since it has been declared, that no conviction or attainder shall work corruption of blood or forfeiture of estate.(c)

In the original conditions of plantation, it was declared, that a legal title should be made to all purchasers from the proprietary by a grant under the *Great Seal of the Province*;(d) thus indicating at once, and from the outset, to all purchasers, that there should be a Chancellor, or keeper of the Great Seal of the Province; whose duty it should be here, as was the duty of the similar officer in England, to pass upon and authenticate all patent grants for lands.(e) But although by a commission, dated on the 15th of April, 1637, the first governor was constituted "*chancellor*, chief justice, and chief magistrate within the province, until officers and ministers of justice should be appointed;"(f) yet grants for lands to the first settlers were issued and authenticated under the hand and seal of the governor alone; and it was not until about the year 1644, that patent grants were authenticated by the Chancellor under the Great Seal of the Province, according to the English mode of making out such deeds.(g) From that time, however, to the present, patent grants have been made out and authenticated according to the form now in use.

The increase in population, and the spreading out of the settlement of the country, so multiplied the demands for the proprietary's lands, that in the year 1680, for the greater regularity and despatch of business in that respect, a *Land Office* was established; in which it was directed, that authentic records of all proceedings in relation to the sale and granting of lands should be made and kept,(h) certified copies of which, as of any other records, are held to be legal evidence.(i) This office was appended to the common law

(z) McCreery v. Allender, 4 H. & McH. 409; McCreery v. Wilson, 4 H. & McH. 412; Fairfax v. Hunter, 7 Cran. 619.—(a) 1799, ch. 79, s. 7.—(b) Land Ho. Ass. 439.—(c) Decl. Rights, art. 24; 1809, ch. 138, s. 10.—(d) Land Ho. Ass. 30, 39. (e) Land Ho. Ass. 64.—(f) 1 Boz. His. Mary. 292; Land Ho. Ass. 64.—(g) Land Records, lib. No. 1, folio 195.—(h) Land Ho. Ass. 108, 232, 283.—(i) Thornton v. Edwards, 1 H. & McH. 158.

side of the Court of Chancery of Maryland, and was evidently considered as corresponding, in almost all respects, to the *Petty Bag*, or enrollment office of the English Court of Chancery. For, in all the proceedings in chancery, in relation to the repeal of letters patent for land by *scire facias*, and to the business and records of the Land Office, the court is always specially designated as "*The Chancery Court of Records;*"(*j*) for the express purpose, as it appears, of distinguishing its common law jurisdiction, in relation to patent grants for lands, in which respect it was, by analogy to the English system, deemed a court of record, from its jurisdiction as a mere court of equity, in which capacity, according to the English law, it was not a court of record.(*k*) The expression, "the Chancery Court of Records," answered very well at the time, and may still serve, with a recollection of the English law to which it refers, as a sufficiently apt and clear designation of the distinction between the two sides of the Court of Chancery, between the two capacities of common law and equity in which it acts; but at present, the Court of Chancery of Maryland must be considered as in all respects a court of record; since all its proceedings, as well in equity as at common law, are recorded; and it has all the powers incident to the jurisdiction of such courts of record.

The lord proprietary's lands always yielded him a very large proportion, and sometimes the only revenue he derived from his Province; and therefore here, as in England, the mode of obtaining titles to lands seems to have been regulated, as well with a view to the safe collection of this branch of the revenue, as to the assuring of justice and fairness to the contracting parties. Before the establishment of the Land Office, here, as in England, the applicant for a patent commenced by obtaining a warrant from the sovereign, under his seal at arms, or *the Lesser Seal of the Province;*(*l*) by which, on the purchase money being paid to the treasurer,(*m*) the surveyor was authorized to lay out the land as required;(*n*) and upon a certificate of the survey being returned to the Chancery Office, the secretary, who was then the recording officer of the Court of Chancery,(*o*) if he approved of the proceedings, made out the patent grant,(*p*) which was to be finally passed upon and authenticated by the Chancellor.(*q*)

(*j*) Land Ho. Ass. 114, 122, 178, 181.—(*k*) Com. Dig. tit. Chancery C. 1 & 2; 2 Mad. Chan. 712.—(*l*) Land Ho. Ass. 43, 65, 76, 98.—(*m*) Land Ho. Ass. 54, 56, 62, 128.—(*n*) Land Ho. Ass. 75.—(*o*) Land Ho. Ass. 43, 65.—(*p*) Land Ho. Ass. 41, 66, 82.—(*q*) Land Ho. Ass. 126.

It must be recollected, however, that the lord proprietary, like the king of England, had the power, and actually did make a multitude of *leases for years* of his lands, without the solemnity of a patent grant under the great seal. These leases were rarely or never at any time signed or sealed by the Chancellor, nor could he in any way check or control the making of them, as he might the passing of a patent grant for an estate of inheritance when it came for the great seal, if a *caveat* should be then filed; and therefore it need only to be observed here, that none of the proceedings which may be met with in our records, in regard to those proprietary leases, can have any relation to the matter now under consideration.(*r*)

But after the establishment of the Land Office, the mode of proceeding to obtain a legal estate of inheritance in lands, from the proprietary, was somewhat differently, and much better regulated. The Constitution of the Republic directed that there should be two registers of the Land Office appointed, one for the Western, and the other for the Eastern Shore.(*s*) And these Land Offices were organized accordingly by a re-establishment of the connexion which had formerly subsisted between the Court of Chancery and the Land Office, and an adoption of all the regulations and the law by which that office had been formerly governed, in so far as they were consistent with the new frame of government.(*t*)

There were under the proprietary's government, and still are, five different modes of beginning to obtain a title to lands; or, in other words, five several kinds of warrants, all of which are now issued by the register under his signature and the seal of his office,(*u*) by which an applicant may obtain a patent for the land he proposes to purchase. If it be his object, in general, to obtain a certain quantity of vacant land, any where, without regard to any particular space, or tract, then, on paying one-half of the stipulated price to the treasurer, he gets from him a titling;(*v*) upon which the register of the Land Office gives him a *common warrant*, directed to the surveyor, commanding him to lay out the specified quantity of land as required. But if required by the applicant, on presenting his titling, the register will insert a particular description of the land aimed at in the warrant itself; which specification gives to it the denomination of a *special warrant*;(*w*) or the register may, with-

(*r*) Land Ho. Ass. 219.—(*s*) Constitution, art. 51.—(*t*) Land Ho. Ass. 300, 305, 307; November, 1781, ch. 20, s. 12.—(*u*) Land Ho. Ass. 466.—(*v*) Land Ho. Ass. 232, 261, 275, 282.—(*w*) Land Ho. Ass. 318, 367, 470.

out any such titling, issue a *common* or a *special warrant*, for vacant land, in lieu of warrant remaining unexecuted in whole or in part; or in lieu of deficiency found, on resurvey, in original tracts, and for composition paid in cases in which the certificate, or grant shall afterwards have been vacated; or where certificates ordered for correction become void by not being afterwards returned within the time prescribed by law.(*x*) Or if the applicant, after having thus obtained a *common warrant*, causes a particular description of the land he wishes to obtain to be noted on the surveyor's book, it has, from the date of such entry, all the effect of a *special warrant*.(*y*) But, if the applicant had already obtained a title to a tract of land, by having had it surveyed, and a certificate returned, or by having obtained a patent for it, and only wished to add to it some contiguous vacancy, he may obtain at once from the register of the Land Office, a *warrant of resurvey*, directed, in like manner, to the surveyor.(*z*) So if any one had caused a particular tract of land to be surveyed, but had failed to comply with the conditions of plantation, and formerly, to take out a patent, or now to compound on the certificate, within the one year, as formerly limited by the proclamation, and now by the law,(*a*) any one else, by an application to the register of the Land Office, and paying to the treasurer one-tenth of the composition then remaining due,(*b*) may obtain from the register a *proclamation warrant* authorizing the applicant to take up the same lands.(*c*) But when, by reason of the sickness or death of the examiner-general, warrants could not be examined and returned in time, the Chancellor has, by a general order, suspended, for a time, the right to take out proclamation warrants.(*d*) And finally, any one by an application, setting forth that a certain designated tract of land had actually escheated by the death of the last individual owner intestate and without heirs, may obtain immediately from the register of the Land Office, an *escheat warrant* authorizing the applicant to obtain a patent for the land so specified.(*e*)

After the applicant has procured any one of these five kinds of warrants, his next step is to have the land surveyed in the manner prescribed by the rules and orders laid down for the direc-

(*x*) Land Ho. Ass. 322; Steuart *v.* Mason, 3 H. & J. 507.—(*y*) Land Ho. Ass. 235, 435.—(*z*) Land Ho. Ass. 149, 322.—(*a*) November, 1781, ch. 20, s. 6.—(*b*) Land Ho. Ass. 469.—(*c*) Land Ho. Ass. 186, 359.—(*d*) Per Kilty, Chancellor, 26th April, 1815, and per Bland, Chancellor, 6th June, 1834; Land Ho. Ass. 443.—(*e*) Land Ho. Ass. 173, 362, 470; Hall *v.* Gittings, 2 H. & J. 125.

tion of surveyors;(*f*) a certificate of which was formerly returned to the Land Office, but now to the examiner-general,(*g*) to be by him critically reviewed; and if upon such examination, it is found to be erroneous, it is sent back to the surveyor for correction; after which it must be lodged in the Land Office within eighteen months from the date of the warrant on which it was made, or it will be deemed void;(*h*) and if ordered by the Chancellor to be corrected, it must be returned, together with the erroneous certificate, within nine months from the date of the order, otherwise it can never be received.(*i*) If the certificate is approved by the examiner-general, it is then taken to the treasurer, who, upon payment of the whole amount of the purchase money, endorses upon it a receipt, specifying that it has been fully compounded on;(*j*) after which the certificate is received into the Land Office, and the day of its being so returned endorsed thereon as being then ready for a patent, if not opposed by a *caveat*.(*k*)

The dealing out of the vacant lands, which had never before been held in separate parcels, not merely as in England, at the time of the Norman conquest, or as after a rebellion in Ireland, among a few of the monarch's favourites;(*l*) but of the whole territory of the State, to an entirely new set of emigrants, who undertook to reduce the wilderness to cultivation, was then a proceeding of the most novel and interesting character.(*m*) The mode of granting lands by the king naturally suggested itself to the viceroy of Maryland as the best; and, as has been shewn, was accordingly as closely followed as the nature of things would permit. But when the Land Office was established, the business of disposing of the vacant lands had become, and was then rapidly swelling to a magnitude, that engrossed a large share of the attention of the government.

It was only by means of this department of the Chancery, called the *Land Office*, that a large proportion of the revenue derived from the sale of vacant, confiscated, or escheated lands, could formerly, or can now be ascertained; and consequently in that point of view, it must have been formerly regarded as a very important revenue office,(*n*) as it continues even yet to be productive. But contemplated in another point of view, it is evident, that it must

(*f*) Land Ho. Ass. 62, 65, 435.—(*g*) 1795, ch. 88, s. 7.—(*h*) Land Ho. Ass. 273, 325, 466.—(*i*) Land Ho. Ass. 466.—(*j*) Land Ho. Ass. 256, 260, 261, 275, 319, 322. (*k*) November, 1781, ch. 20, s. 3 & 6; Digges *v.* Beale, 1 H. & McH. 67; Lord Proprietary *v.* Jenings, 1 H. & McH. 140.—(*l*) Godw. Com. Eng. b. 4, c. 27. (*m*) Land Ho. Ass. 299.—(*n*) Land Ho. Ass. 302.

be considered as the fountain and depository of the primitive muniments of title to all the landed property in the State;(*o*) in which respect, the surveys returned to, and the patents recorded in it, together constitute a *domesday book*, in which a more accurate description of all the lands of this State is to be found, than of the lands in the records of any other country whatever.(*p*)

Hence, instead of committing the affairs of this vastly important office, in the absence of the lord proprietary, to the care of a mere ministerial officer, called "The Clerk and Register of the Land Office," a council for lands was established, (1684,) to whom was assigned the duty of supervising the Land Office, and of determining upon all matters relating to land which might be brought before them, "by any of the inhabitants suing for acts of *grace* and *favour* therein;" according to a set of instructions specially describing their powers and duties;(*q*) which powers and duties were, some years after, confided to a single person specially commissioned (1695,) for that purpose.(*r*) After which, by an order of the lord proprietary, (1721,) reciting, that the power of granting warrants for taking up waste, cultivated and uncultivated, and surplus land, and the finishing such warrants by making the grantees an estate of fee simple, had then chiefly centred in the *deputy secretary;* and that the hearing and determining differences arising between contending parties in land affairs, which had usually been heard and determined in the Land Office, must naturally fall under his cognizance; he was empowered to judge and determine in those affairs, "*as far as he legally might*, according to right, reason, and good conscience."(*s*) More than ten years after which, by a special and distinct commission, one person was appointed (1732,) to be *judge* and register of the Land Office, with full power and authority to act, hear, judge, and determine in land affairs, according to right, reason, and good conscience, *and the several instructions and orders* which should from time to time, be given to him by the proprietary.(*t*) Accordingly, in the instructions soon after sent to the Chancellor, as well as in those given to the judge and register of the Land Office, it was expressly declared, that he should be assisted in his determinations by the Chancellor.(*u*) And it moreover appears, that there was, for some time, an appeal allowed, during the provincial government, from the judge

(*o*) Cockey *v.* Smith, 3 H. & J. 26.—(*p*) Land Ho. Ass. 300.—(*q*) Land Ho. Ass 108, 112.—(*r*) Land Ho. Ass. 127.—(*s*) Land Ho. Ass. 227.—(*t*) Land Ho. Ass. 231, 260, 268, 269.—(*u*) Land Ho. Ass. 232, 234.

of the Land Office to *the Board of Revenue*, and at other times, as to some matters, to the Chancellor.(*v*)

After a certificate was returned to the Land Office, it was formerly, as now, necessary that it should remain there six months to afford an opportunity to any one concerned to enter a *caveat* against the emanation of a patent.(*w*) But apart from, and in addition to the regular proceeding by *caveat* before the Chancellor, which it appears always might have been instituted, as at present, in any case where there was a proper ground for it, there were a variety of other causes of applications for relief, where nothing like a judicial controversy had been, or perhaps could be instituted or brought before a court of justice in any form whatever. If, after the lapse of the limited period no *caveat* is entered, and the register finds the certificate, and all other proceedings to be correct, he prepares a patent which is signed, sealed and issued as of course.(*x*) If the certificate, after having been returned to the office, has been assigned; or the holder of it has died, it is not necessary, as in England, to renew the whole proceedings; but it is sufficient to state the facts to the judge of the Land Office in a petition, accompanied by suitable vouchers, such as the written assignment itself, the will of the deceased, an affidavit of some disinterested person stating who were his heirs or devisees, &c., upon which a patent is ordered to be issued to the assignee, devisee, or heir; or, in doubtful cases, to one to hold according to his interest, to the uses of a will or the like. If the certificate or other proceedings are obviously erroneous in some immaterial particular, it may be corrected, on a petition setting forth the errors.(*y*)

As to these and all such anomalous cases, which were much more common before the revolution than at present, the application was made to the lord proprietary in person,(*z*) or to his council for lands, or to his judge of the Land Office; and it was considered not as the commencement of a judicial proceeding of any kind, but as "suing for acts of *grace* and *favour*." As to all which matters the judges of the Land Office were in fact, but executive officers charged with the special direction, in peculiar and anomalous cases, of an establishment of great importance to the lord pro-

(*v*) Land Ho. Ass. 262, 273, 283; Chancellor's Case, post, note *r*.—(*w*) Land Ho. Ass. 278, 492; April 1782, ch. 38, s. 2.—(*x*) Land Ho. Ass. 492.—(*y*) Land Ho. Ass. 323, 434, 493, 494; Lloyd *v.* Tilghman, 1 H. & McH. 86; Lord Proprietary, 1 H. & McH. 135; Joice *v.* Harris, 1 H. & McH. 196; Hall *v.* Gittings, 2 H. & J. 112.—(*z*) Land Records, lib. C. B. 143, &c.

prietary. The power to grant acts of grace and favour, which, under the proprietary government, had been thus confided first to a council for lands, and then to judges of the Land Office, was, after the revolution, recognised as having devolved upon the Chancellor; and it has accordingly been always so exercised by him; but, it is merely a power to revise certain proceedings in respect to the sale of public lands, and to correct immaterial errors in cases, which involved none of that judicial power proper and necessary for the management and determination of controversies between two or more citizens, such as that which was then, and is now exercised by the Chancellor in determining on a *caveat* case.(*a*)

A *caveat*, in the Land Office, is a warning to the Chancellor not to put the great seal to a patent for a certain tract of land as prayed by the holder of the certificate of the survey. As all that relates to patents for land belongs properly to the common law side of the Court of Chancery, here as well as in England, it necessarily follows, that a *caveat* must be the commencement of a judicial proceeding on the same side of the court with that to which it is opposed; and consequently, as to all controversies brought before the Chancellor, by *caveat*, he holds a common law court of record; or as it was formerly said, the proceedings are in "the Chancery Court of Records," not in a mere court of equity.(*b*) And considering it as a court of record, it has, like all courts of common law or of equity of that description, the power to regulate its own practice and proceedings; which regulations become the law of the court, and of the case also, so far as they apply.(*c*) And as a grant for land can only be obtained through the Land Office, in which all the preliminary preparations for it are deposited, it follows, that a *caveat* can only be presented to the Chancellor in that office; and, in general, after the proceedings have been so far matured as to be ready to have the great seal put to the grant.(*d*) A *caveat* is most usually entered by a simple endorsement of the word "*caveat*" upon the certificate, if there be one returned to the office; or otherwise by a note on the record opposite to the warrant, without any specification whatever of the cause of *caveat*;(*e*) but it can only be entered by the interested party himself, or by the direction in writing of his attorney.(*f*) And when entered, it cannot be permitted to continue longer than

(*a*) Land Ho. Ass. 273, 434; November, 1781, ch. 20.—(*b*) Land Ho. Ass. 331, 465.—(*c*) Land Ho. Ass 434, 442, 461.—(*d*) Land Ho. Ass. 467.—(*e*) Land Ho. Ass. 321, 379, 487.—(*f*) Land Ho. Ass. 442, 443, 487, 491.

twelve months, unless under special circumstances. A *caveat* by two or more does not abate by the death of one of them, as it does where it has been entered by one only.(*g*)

The grounds upon which a *caveat* may be entered are various; in general they must be such as shew, that no grant ought to be issued; because to do so would be unjust to the public, or to some individual;(*h*) or because the applicant had, in some way, failed

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(*g*) Land Ho. Ass. 283, 442, 443, 490; 1797, ch. 114, s. 10.

(*h*) Land Ho. Ass. 90, 91, 304, 449, 453, 491.

RIDGELY *v.* JOHNSON.—*24th November*, 1891.—HANSON, *Chancellor*.—The Chancellor having examined all the depositions in this cause, produced to support the allegations of the parties, together with the plot returned for illustration; and having considered also the arguments of the counsel on each side, and having deliberated thereon, is of opinion as follows:—

He must first make some preliminary remarks.—When a man *caveats* a certificate, on the ground that the land, surveyed as vacancy, is comprehended in his patent; unless the Chancellor is thoroughly satisfied, that the fact is so, it is the invariable practice to dismiss the *caveat*, suffer a patent to be issued on the certificate, and leave the parties to contend at law, before a court and jury. And for this plain reason, that a dismission puts an end to the pretensions on one side, but leaves the other party, viz. the caveator, in a condition so to contend. Besides, the State is interested. If the *caveat* be allowed, it may be, that the State thereby loses the benefit of granting vacant land.

But independently of the claim or pretensions of a caveator, or caveators, it is clear that, if in any case it appears, that the land comprehended in a survey is not properly grantable, no patent ought to issue for the same. That this position is just, appears from the decree of Chancellor Rogers, who in the year 1736, vacated a patent, on the ground that the land therein contained was not grantable. For surely, if a patent be repealed, or vacated on that ground, it must be supposed, that a patent would not have issued, if the ground had been known, before the patent was granted.

That the law respecting accretion, alluvion, and islands, in small waters or rivers, is part of the law of Maryland, as well as of the law of England, and indeed as of the law of nature, the Chancellor, on reflection, entertains not a doubt; and in his conception, it is of no consequence, whether the persons, having lands on such waters, acquired their title before, or after the islands, opposite to their lands, were formed. They had, at any rate, a common right to the river; and, of course, either one, or all of them, has a right to the benefit of an island formed in the river. And even, if they have not an exclusive right to the benefit of such islands, it seems, at least, that all those, having lands in the river, or the inhabitants in general of the State, must have that right. In this State, it may be said, that a man can claim nothing, except what is contained, or described in his patent. But the right of following the water, or having the benefit of accretion, has been admitted; and mighty inconvenience would result if it were not so settled. And the common right of those having land on small waters to the little islands, which are formed after their titles acquired, seems at least as reasonable, as the right of accretion. But the principle of the case decided by Mr. Rogers applies to the present case. In short, it appears to the Chancellor, that a patent cannot possibly, with propriety, issue to the defendant in this cause; although what person, or persons, or whether any person may be exclusively entitled to the flat, island, or marsh, surveyed by the defendant, may hereafter be a subject of litigation.

to comply with the conditions of plantation ;(*i*) as where, under a warrant of resurvey, two or more distinct tracts, not contiguous by means of vacancy or otherwise, were attempted to be included in one patent,(*j*) or where the special warrant contained more than one location ;(*k*) or because the facts and circumstances set forth in the proceedings were, in some material particular, irregular, or untrue ; as that the survey had not been made according to the rules of the Land Office ; or, as in case of an alleged escheat, that the late owner had not died intestate and without heirs as averred by the applicant,(*l*) or if the lands are actually escheatable, that the per-

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Upon the whole, it is adjuged, ordered, and decreed, that the *caveat* of the said Charles Ridgely against Horatio Johnson's certificate of a tract of land, called Johnson's Meadows, be, and it is hereby declared to be, allowed, and ruled good.

(*i*) Land Ho. Ass. 327, 453 ; 1795, ch. 88, s. 11 ; Lloyd *v.* Tilghman, 1 H. & McH. 86 ; Hammond *v.* Ridgely, 5 H. & J. 263.

(*j*) Land Ho. Ass. 390, 421, 422, 447 ; West *v.* Hughes, 1 H. & J. 11 & 13.

(*k*) Land Ho. Ass. 444.

(*l*) Land Ho. Ass. 381.

Aisquith *v.* Godman.—It appears from the statement of facts agreed on by the parties, that of lot No. 40, in the city of Baltimore, a certain William Nicholson was seized in fee simple on the 20th of June, 1761 ; and, being so seized, he made his will, and thereby devised it to his niece Elizabeth Connell, in fee tail general, remainder to his brother John Nicholson, of the county of Cumberland, in England, and his heirs ; which said John Nicholson never was a citizen of the State of Maryland ;—That William Aisquith, the caveator, intermarried with Elizabeth Connell, the devisee, by whom he had issue a son, John Aisquith ;—that Elizabeth Aisquith died on the first of January, 1782, leaving her husband, the present caveator, in possession of the lot, and their only child, John Aisquith, who died intestate and without issue on the 1st of July, 1785. It is further stated, that the caveator took out a warrant of escheat on the 15th of October, 1785, to affect said lot, and returned a certificate thereof, but did not compound thereon ; and the caveatee, Samuel Godman, on the 3d of June, 1796, proclamated the said certificate, and returned his certificate thereof to the office on the 29th of May, 1797 ; on which the said Aisquith entered a *caveat* against a patent issuing thereon ; alleging, that by the laws of this country, the said lot is not liable to be affected by an escheat warrant, and is not escheatable.

24th May, 1798.—Hanson, *Chancellor*.—The said *caveat* being submitted to the Chancellor, on a statement of facts, signed by the counsel on each side, the said statement, and the certificate, and all other papers thereto relative, were by the Chancellor read and considered.

It appears to him, that the facts contained in that statement are conclusive for the caveator. It is stated, that Elizabeth, the wife of the caveator, being tenant in tail of the land in question, died in 1782, leaving one child only, a son, who died without issue in 1785 ; that after her death a warrant of escheat was taken out by the caveator, who returned a certificate ; and that, on his failing to compound, the defendant took out a warrant of proclamation, and returned the certificate which is caveated.

There is no rule in this office better established than this,—that the validity of a proclamation warrant must depend on the warrant, under which the land intended to

son who died seized was indebted to the *caveator*, and others who were entitled to have the lands sold, and the proceeds applied in

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be affected by the proclamation warrant, was surveyed. In the present case, it is clear, from the statement, that the escheat warrant, under which the survey, proclamated by the defendant, was made, was invalid. The act of November, 1781, ch. 20, sec. 8, expressly says, that no escheat warrant shall be good, unless the owner (that is, the person on whose death it issued) hath died seized in *fee simple*. But here the warrant recites the dying seized of the aforesaid Elizabeth Aisquith as the ground of the escheat; and it appears from the defendant's own shewing, that she did not die seized in fee simple; but that the land descended from her to her son, as issue in tail, and no attempt is made to show, that the land was otherwise liable to escheat.

The admission of the parties, which is at least equal to the result of a trial at law, has precluded a point, which might perhaps have been otherwise made.

Upon the whole, it is adjudged, and ordered, that the *caveat* of William Aisquith against Samuel Godman's certificate of lot No. 40, in the city of Baltimore, be, and it is hereby declared to be good, but that each party shall bear his own costs.

Hammond, in behalf of the Baltimore Company *v.* Godman.—28*th December*, 1799.—Hanson, *Chancellor*.—The caveator having taken out a *subpœna* from chancery, for the defendant to appear here on this day, to answer the said *caveat;* and the defendant appearing, as he alleges, in consequence of the service on him of the said *subpœna*, which is by him produced, there was presented to the Chancellor in behalf of the said caveator, and as the support of his *caveat*, a deed from Daniel Nicholson, for conveying to the company aforesaid the land in question. In the said deed, Daniel Nicholson is recited to be the heir of John Nicholson, the patentee of the said land, on whose supposed dying seized without heirs, the escheat warrant in this case was obtained by the defendant. No proof, except the said recital (which cannot operate otherwise than against the grantor, and those claiming under him,) is offered, to prove that the said land actually descended from the patentee to the said Daniel Nicholson, or that the said patentee ever conveyed or devised the said land to any person whatever, or that the said patentee has left any person capable of taking as his heir.

On a certificate, returned to this office, in consequence of an escheat warrant, it is the settled rule and practice, founded on the plain principle of benefit and convenience to the State, and on common sense, that the caveator of the certificate shall shew a title in himself, or in some other person. If he cannot do this, why should not the person, who applies for the land as escheat, and is willing to pay the State accordingly, be allowed to take a patent. The State assuredly is interested in, or at least cannot suffer from permitting him to take it as escheat, on the prescribed terms. He alone incurs a risk; and the patent, which he obtains, is not to invalidate, or affect, the right of any other person. The patent puts him in a condition fairly to contest the question with any person, who claims the land, under a superior title; and it is certainly nothing more than right, that the title be fairly tried in ejectment. Whatever title the aforesaid company has in the land, it will not be affected by a patent to the defendant.

The Chancellor makes these remarks, because he conceives it probable, that the practice and rules of this office may not be generally understood.

On the whole, it is adjudged and ordered, that the *caveat* of William Hammond against Samuel Godman's certificate of a tract of land, called Nicholson's Delight Rectified, be, and it is hereby declared to be, dismissed; and that the said caveator pay to the defendant, Samuel Godman, all costs, by him incurred in defence of the *caveat* aforesaid.

satisfaction of their claims.(*m*) But the most common ground of *caveat* is, that the lands specified in the certificate on which the patent is asked, are not vacant; but are, in whole or in part, included in an elder warrant, entry, survey, or patent.(*n*) And, wherever the same land is contained in the certificates of both parties to a *caveat*, it is considered, that each of the parties has *caveated* his antagonist.(*o*)

The method of bringing a controversy, instituted by a *caveat*, to a hearing appears to have been taken from that pursued in England; and was always, from a very early period of the provincial government, essentially the same as at present.(*p*) On a *caveat* being entered, both parties may be considered as actors; for, if called for, by either party, an order may be passed appointing a day for hearing; but no *caveat* can be dismissed without hearing, or giving the parties an opportunity of being heard.(*q*) After a party has thus obtained an order appointing a day for hearing, a *subpœna* is issued from the chancery office under the great seal, as formerly, to summon the opposite party to appear before the Chancellor to maintain, or to answer the *caveat*. And *subpœnas* may, in like manner, be issued to summon witnesses to testify.(*r*) If required, the parties may, by the same or a separate order, obtain authority to take the depositions of witnesses before any justice of the peace on giving notice as usual, and also, a direction to the surveyor of the county, or some other impartial person to survey the lands, and lay down the conflicting pretensions of the parties; and the surveyor may summon witnesses to give evidence on the survey.(*s*) Upon the return of all which, on the day appointed, the arguments of the parties are received by themselves, or their attorneys either orally or in writing; unless before, or on that day, further time be allowed for the hearing, of which the party obtaining the order must give his antagonist notice.(*t*)

The applicant for the patent must make out his case by shewing himself entitled to a patent for the tract of land he has caused to be designated in his warrant, his entry on the surveyor's book, or by his certificate; and thus, in general, holding the affirmative, he opens and concludes the argument.(*u*) After which the case is

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(*m*) 1785, ch. 78.—(*n*) Land Ho. Ass. 83; West *v.* Hughes, 1 H. & J. 9. (*o*) West *v.* Hughes, 1 H. & J. 10.—(*p*) Land Ho. Ass. 73, 83.—(*q*) Garretson *v.* Cole, 1 H. & J. 374; April 1782, ch. 38, s. 8.—(*r*) Land Ho. Ass. 331, 488; April 1782, ch. 38, s. 11.—(*s*) Land Ho. Ass. 426, 488; 1789, ch. 35, s. 6.—(*t*) Land Ho. Ass. 439.—(*u*) Land Ho. Ass. 453.

decided by the Chancellor according to right, to reason, and to good conscience; or in other words, according to the rules of the Land Office, and the whole law properly applicable to the case:(*v*) or he may decree thereon according to equity and good conscience, and agreeably to the principles established in the High Court of Chancery, as if the matter were brought before him by a bill in Chancery.(*w*) If the certificate be incorrect the Chancellor may, at the instance of the party, order the survey to be corrected in such manner as he shall direct.(*x*) In some cases, if the certificate be vacated, he may order other warrant to be issued to the party to the amount of the vacated certificate on which the composition had been paid;(*y*) and, as in chancery, he may award costs and enforce the payment of them to the prevailing party.(*z*)

It is said, there are some instances to be found, within the early periods of the provincial government, in which controversies instituted by *caveat* have been tried in the courts of common law.(*a*) In proceeding by *scire facias* in Chancery to repeal letters patent, where an issue of fact is joined between the parties, as the Chancellor cannot call a jury before him, the case is sent to a court of common law for the purpose of obtaining the verdict of a jury upon it.(*b*) And so, in the instances alluded to, it might formerly have been the practice here in cases of *caveat*, as on a *scire facias*, to have the facts found by a jury convened in a court of common law. But however that may have been, it is certain, that no such practice appears to have ever prevailed in England, and that here, all *caveat* cases are now exclusively and finally determined by the Chancellor, from whose decision there never was, nor is at the present time any appeal allowed.(*c*) But, although there be no appeal properly so called; yet the party, if refused a patent, might have obtained redress from the sovereign, and, in that respect, unlimited discretion of the lord proprietary; or he may at present obtain it from the General Assembly of the State: or if the patent should be granted, the caveator is not concluded by it, for he may have it repealed by information or *scire facias* in Chancery, or nullify its operation in an action at common law.(*d*) So that in either alter-

(*v*) Land Ho. Ass. 316, 373, 374, 400, 446, 452, 462; November, 1781, ch. 20, s. 6.—(*w*) 1789, ch. 35, s. 4; Land Ho. Ass. 384; Hammond *v.* Warfield, 2 H. & J. 151.—(*x*) Land Ho. Ass. 403, 420, 450; West *v.* Hughes, 1 H. & J. 9.—(*y*) Land Ho. Ass. 473.—(*z*) 1797, ch. 114, s. 8.—(*a*) Land Ho. Ass. 84, note; Noland *v.* Cromwell, 4 Mun. 160.—(*b*) 1 Mad. Chan. 4.—(*c*) Land Ho. Ass. 388, 409, 410, 415, 418, 424.—(*d*) November, 1781, ch. 20, s. 13; Carvill's Lessee *v.* Griffith, 1 H. & McH. 316; Report of D. Dulany, 1 H. & McH. 554.

native of putting or withholding the great seal, a direct appeal, in *caveat* cases, is thus rendered unnecessary; and, as regards the rights of the State, nugatory if not entirely improper.(*e*)

When a patent has been finally authenticated, by having had the great seal affixed to it, there can be no proceedings in the Land Office, by *caveat*, in relation to it, the Chancellor's legal jurisdiction in that form, as keeper of the great seal, having been thus entirely cut off;(*f*) except in the case of a patent obtained in secret trust for a surveyor.(*g*) After a patent has been thus finally passed, it is, before its being delivered, recorded together with the certificate, assignment, petition, and order on which it was granted.(*h*) But it must be recollected, that all cases of *caveat* on the Eastern Shore are there brought before the judge of the Land Office for the Eastern Shore, from whose judgment there is an appeal allowed to the Chancellor.(*i*)

(*e*) Land Ho. Ass. 486.—(*f*) Land Ho. Ass. 495.—(*g*) 1789, ch. 35, s. 2.—(*h*) Land Ho. Ass. 495.

(*i*) 1795, ch. 61.

WILLING *v.* WRIGHT.—*25th May*, 1802.—HANSON, *Chancellor*.—This is the case of an appeal to the Chancellor from the decision of the judge of the land office of the Eastern Shore. The act of assembly, creating the place of the said judge, and giving an appeal from his decision, not having directed in what manner the appeal shall be prosecuted; but a transcript from the register of the said office, to the register of this office, of proceedings in the case of Evans Willing against Sowan Wright, having been here filed; and the said Wright praying the Chancellor to take order in the case, for the purpose of bringing it to a final decision; the Chancellor, on deliberation, passed an order on the 6th day of March last, to be served on the said Willing. In case of such service, and the appearance here on this day of Willing, in person, or otherwise, the Chancellor, according to the said order, was to proceed to an examination and decision. In case of such service, and no appearance, the Chancellor, according to the said order was to dismiss the appeal.

Now here, this day come both parties. Willing acknowledges the due service of the order, and does not say otherwise, than that he is ready for a decision.

On examination of the said transcript, and of certain papers mentioned in it, the Chancellor perceives no reason, wherefore he should reverse the decision. Indeed the transcript is so defective, that he can scarcely perceive what were the points of dispute. However, there is nothing in it to show, how Willing, the *caveator* and appellant can possibly be injured by Wright's obtaining a patent, and although it is very unusual with the Chancellor to give an opinion on a point of law, he does not hesitate to concur with the judge's opinion, on what appears the great point, viz.: the construction of Panter's will to Hall. The point indeed is so plain, as not possibly to admit of a doubt amongst lawyers.

Upon the whole, it is adjudged, ordered and decreed, that the order and adjudication of Thomas I. Bullett, judge of the land office of the Eastern Shore of Maryland, in the case aforesaid, of Evans Willing against Sowan Wright, made on the 24th January 1801, be and it is hereby affirmed, or that the appeal of the said Willing from the said order and adjudication, is hereby dismissed; the Chancellor being

From all which it appears, that the mode of obtaining a grant of public lands, and proceedings by *caveat*, on the common law

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really doubtful, whether, under all circumstances, the appeal should be said to be dismissed, or the decision of the judge be said to be affirmed. The meaning of the Chancellor is, that nothing be gained by the appeal, and that hereafter it be no obstacle to the said Wright's obtaining a patent.

The said act of assembly does not direct, what shall be done in case of an affirmance on an appeal. But the Chancellor conceives, that he may with propriety direct, and accordingly he does hereby direct, that the transcript aforesaid be returned, along with an attested copy of this adjudication, order or decree, to the register of the land office of the Eastern Shore; and that, on the receipt of the said transcript, there shall be the same proceedings in the said office, on the certificate of resurvey of Sowan Wright, which was *caveated* by Evans Willing, as if there had been no appeal as aforesaid.

HOPPER *v.* COLESTON.—2*d March*, 1803.—HANSON, *Chancellor*.—The said William Hopper appeals from the decision of the judge of the land office for the Eastern Shore, on a *caveat* there instituted by him against the appellee, or defendant. The transcript of the proceedings in the said office on the said *caveat*, except the plat there exhibited for illustration, are here filed by the said *appellee*; and it was, at his instance, that this day was appointed for hearing the appeal, by an order, passed on the 1st day of December last. It appears, that a copy of the said order has been duly served on the appellant, from whom the Chancellor lately received a letter, praying a postponement of the hearing. The defendant, James Coleston, now appears here, in person, and prays the Chancellor to proceed to a decision.

As Mr. Hopper's application for a postponement is principally grounded on the idea, that the Chancellor may direct new evidence to be taken, before he decides, in the same manner, as if he were about to exercise an original jurisdiction, this ground must certainly fail. An appellate jurisdiction has to decide merely whether or not the inferior jurisdiction gave a just decision *on the case before* it. Were the appellate jurisdiction to admit new proofs, it would decide on a case, different from that which was before the lower tribunal; and therefore, it would not appear, from its decision, whether the first decision was right or wrong.

The Chancellor proceeded to examine the transcript, with a view of being informed of the nature of the case. Mr. Hopper had, in his letter, stated, that indisposition would prevent his attendance on this day. It was the Chancellor's intention, if the case should appear difficult, or if the transcript should be materially defective, to postpone the decision.

It is certain, that the plat, for illustration, ought to have been part of the proceedings, transmitted to this office; but the full perspicuous statement, made by the judge enables the Chancellor to understand the case, as fully without, as with the plat; and there seems to be not the least difficulty in the case, every point therein having long since been settled in this office.

A question indeed might be made, whether or not an appellate court can give *relief* to an *appellee*; that is to say, whether or not the said court ought not to confine itself to the question, whether or not the *appellant* is entitled to relief. But the High Court of Appeals, in the case of Scott against Chapline, gave relief to Scott, who was satisfied, and *did not appeal*, against Chapline who was dissatisfied, and therefore *did appeal*. But setting this precedent aside, the Chancellor conceives it his duty to rectify mistakes in whatever way he may be apprized of them; and particularly to have the rules here established to prevail on the Eastern Shore.

side of the Court of Chancery, to prevent the emanation of a patent, are, and always have been substantially the same in Maryland as in England; insomuch so as to leave little room to doubt, that the law and the forms of proceeding of Maryland, in relation to the making out of grants, and the proceeding by *caveat*, were derived entirely from those of England with only such modifications here as the circumstances of the country required.

But by an act of assembly touching the taking up of land, passed during the government of the first lord proprietary, it was

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The judge of the Eastern Shore land office in effect has said, that Coleston could, under his warrant, survey no land which did not correspond to the description or location of his warrant. But it has been here long since settled, that a special warrant shall be allowed to do every thing, which a common warrant might do. It appears, that a common warrant might have affected any part of the vacancy comprehended in Coleston's certificate, that is to say, that no other warrant affected it; and therefore it is rightly comprehended in Coleston's certificate. The Chancellor is glad of an opportunity of informing the judge of the Eastern Shore land office of an important point, of which the said judge could not reasonably be supposed to be apprized; and which whether it be right or wrong the present Chancellor did not decide. It was in fact decided under the former government.

Under a common warrant any uncultivated vacant land, not before *surveyed*, or *located*, may be affected. A special warrant of vacant cultivation is intended to affect a *particular vacancy described in the warrant*. If it accurately describes the vacancy, it effectually binds it, against all subsequent warrants or locations. But nothing is better established than this,—that a special warrant of vacant cultivation may abandon its first intention and may be used to affect any lands, which may be affected by a common warrant, however distant they may be from the land described in the special warrant.

It appears then to the Chancellor, that the judge's direction to exclude the vacancy not contiguous to the land, mentioned in the special warrant, is wrong; and that Coleston is entitled to a patent for every part of the land, included as vacancy in his certificate, when certificates of the several parts shall be returned, and

It is accordingly adjudged and ordered, that the transcript of the record in this case be returned to the aforesaid judge, and that he be and is hereby directed to proceed, and to direct proceedings for carrying into effect his decision for returning as many separate certificates of the vacancy, surveyed for the defendant, James Coleston, as there appear to be distinct pieces of vacancy, in the certificate of "Guardian's Neglect."

The Chancellor's decision, or rather his declaration of the rules of the land office is simply as follows:—whatever may be done by a common warrant, may be affected by a special warrant of vacant cultivation. It makes no difference whether or not the survey under a special warrant includes part of the land designated by the special warrant. In fact the important difference between the two warrants is, that the special warrant, before survey, affects the land *accurately described* in it. The common warrant affects no land, until it is surveyed, *or located with the surveyor*. When a certificate has returned two or more distinct tracts, each having a certain beginning, the surveyor is directed to return several distinct certificates on each of which a patent is to be obtained.

As to costs, they are left to the discretion of the judge.

among other things declared, that every one claiming title to any land in certain to be holden of his lordship, may demand his claim to be entered upon record, and such entry shall bar all ensuing grants of the same land till the claim be tried.(*j*) This legislative provision may probably have been the suggestion from which *special warrants* arose; and it is also not unlikely, that it gave rise to a practice, which was introduced not long after, of designating the land intended to be surveyed by a *caveat* in the office, and the marking of trees as a still more conclusive location and appropriation of the land until it could be actually surveyed. But this mode of designating lands by *caveat* endured but a short time, and is now entirely obsolete.(*k*) A *caveat* against the emanation of a patent, it will be recollected, has always been regarded as, in fact, the commencement of a judicial controversy; whereas this *caveat* in the office was nothing more than a warning to all persons not to take up the lands therein described; it was in truth no more than a *special entry* of the party's claim upon record, like that made in a special warrant, or in a surveyor's book; and had no analogy whatever to a *caveat* in chancery. It may also be well to recollect, that the proceeding by *caveat* in the Orphans Court,(*l*) as derived from the ecclesiastical courts of England,(*m*) is essentially different from the *caveat* in chancery against the emanation of a patent. And the term *caveat* has in our judicial proceedings been applied in other cases as an admonition to the court not to do certain acts, to which a party objected, until he could be heard; as not to record depositions taken under a commission to mark and bound lands,(*n*) or not to enter up a judgment or pass a decree upon an award, and the like.(*o*)

We may now pass on to the consideration of the case brought before the court by this *caveat* in the Land Office.

According to the known and long established principles upon which public lands may be acquired by an individual from the State, the title commences with the *designation* of the tract by the purchaser. After the date of the designation, and before a grant has been issued, the title is inchoative, and imperfect; but when a grant has been obtained, the title is then absolute and complete. A sufficient description of the land intended to be secured gives an

(*j*) 1642, ch. 51; Land Ho. Ass. 248.—(*k*) Land Ho. Ass. 215.—(*l*) Dep. Com. Gu. 160; 1798, ch. 101, Sub-ch. 2, s. 9.—(*m*) 1 Jac. Law Dict. 407.—(*n*) Roch *v.* Giles, 1 H. & McH. 186.—(*o*) Dorsey *v.* Jeoffray, 3 H. & McH. 121; Shelf. Lun. & Idiots, 104, 654, 924; *In matter of Fust*, 1 Cox. 418.

incipient title against every person who has not before taken some method to secure the same land.(*p*) It is held, upon common law principles, that the grant relates back to the date of the specification; and, by a kind of *jus postliminii*, the purchaser is deemed to have had a perfect legal title from that period to all intents and purposes whatever.(*q*) He may maintain an action of trespass for any injury done to the land within that interval of time;(*r*) and he may, in that interval, if he has paid the whole caution money, obtain a warrant of resurvey, which is only incident to a *legal* title, and cannot be founded upon a mere *equitable* right of any kind.(*s*) On the death intestate of the holder of such an imperfect legal title, the right descends to his heirs, as real estate, to whom alone the patent can be granted. This doctrine of *relation* is founded upon principles of common law altogether and exclusively.(*t*) There are, however, some cases in which this *imperfect title*, which precedes the grant, is spoken of as being an *equitable interest.*(*u*) But that cannot properly be called an *equitable* title, which a court of equity cannot enforce, or have specifically executed. And it would seem strange to call that an equitable title, which, after a grant has issued, all common law courts, upon the common law principle of *relation*, treat as the commencement of a *perfect legal title*. Besides, to speak of an imperfect legal title as an equitable interest, has a tendency to confuse legal distinctions, and to obscure that which is otherwise sufficiently plain and clear.

In reference to the jurisdiction of the Chancellor, in cases of *caveat*, the distinction between *legal* and *equitable* rights, properly so called, is unknown. The true and only difference, as regards his power in such cases, being that which exists between *imperfect* and *perfect* legal titles; those which are merely in *fieri*, and those which are *complete*. The cognizance of all controversies respecting imperfect legal titles derived immediately from the State, belongs exclusively and finally to the Chancellor in his common law capacity as the keeper of the great seal, the affixing of which is essential to the authentication of a patent; which capacity of the Chancellor, as relates to patent grants for land, is designated

(*p*) Land Ho. Ass. 461.—(*q*) 3 Blac. Com. 210.—(*r*) Chapline *v.* Harvey, 3 H. & McH. 396.—(*s*) Land Ho. Ass. 152, 149, 420, 427, 447, 455.—(*t*) Lloyd *v.* Tilghman, 1 H. & McH. 85; Spalding *v.* Reeder, 1 H. & McH. 189; Hath's Lessee *v.* Polk, 1 H. & McH. 363; Report of D. Dulany, 1 H. & McH. 553; Kelly's Lessee *v.* Greenfield, 2 H. & McH. 133; West *v.* Hughes, 1 H. & J. 13; Beall's Lessee *v.* Beall, 1 H. & J. 347.—(*u*) Howard *v.* Cromwell, 4 H. & McH. 329, & 1 H. & J. 118; Ringgold *v.* Malott, 1 H. & J. 317; Beall's Lessee *v.* Beall, 1 H. & J. 348.

by his style of judge of the Land Office. The rules of decision by which the Chancellor is governed in the exercise of his jurisdiction, in all such cases, are to be found in the established law of the Land Office, or, in the absence of any such positive law, the rule of decision may be drawn from the principles of equity as established in the High Court of Chancery. The whole law of the Land Office is thus made up of certain positive regulations, of usages, and of common law and equitable principles respecting *imperfect* legal titles; or those contracts for land between the State and her citizens which are found in an immature and unfinished condition.

It is a well settled general rule, that under a special warrant the title to the land commences from the date of the warrant itself; because the description of its location, embodied in the warrant, has distinguished it from every other tract. The warrant is, therefore, in itself equivalent to a designation by an actual survey. So too the title commences with the date of a warrant of resurvey, and of an escheat, or a proclamation warrant. But upon a common warrant, it only commences with the date of the certificate of survey; or from the date of the entry of a special location upon the surveyor's book. The land aimed at becomes thus bound, because of its having been, by some of these modes, accurately described and distinctly specified. The reason of the rule is the same in all these cases, and the evils to be avoided alike in all.

The citizen is allowed one year, from the time he designates the land he proposes to obtain, to complete his purchase, and perfect his title according to the prescribed rules. During which time the State stands pledged to sell that land to no one else. But the State might be greatly retarded, embarrassed and defrauded in making sale of its lands, if they could be tied up, and held bound by any loose, shifting, or indefinite description of them. And the allowing of lands to be bound by vague descriptions, would be no less grievous in its consequences to individuals. No purchaser could be sure of his purchase. He might be jostled out of his location by one who had given no previous distinct intimation of its being that place or tract which he had in view. The records would furnish no sure guide; and the chief distinction between a common and a special warrant would be frittered down to nothing, or continued only as a delusive name.(*v*)

(*v*) Report of D. Dulany, 1 H. & McH. 553; Land Ho. Ass. 401.

All the questions that have been raised, in the discussion of the merits of this *caveat*, are therefore resolvable into this one: What is that degree of accuracy of the description of the land aimed at, which is deemed necessary in a *special warrant* to give it a binding effect? Upon this subject there seem to exist some difficulties which have not yet been removed, although the question has been often under the consideration of the Chancellor.

The distinction between a special and a common warrant, as now understood, and so well established, it is said, was not expressly and generally recognised until about the year 1750, when warrants having a location, by the specification of the particular place where the quantity of land therein called for was to be laid out, were called special warrants, in contradistinction from common warrants describing no place; and which, therefore, might be applied any where.(*w*) It has been laid down, that the description contained in a special warrant should suit none but the land contended for; and should be so full and certain as plainly to point out the intention. But it is said, that, although the exact lines, limits, or boundaries, cannot be expected to be set down before the survey is made, the description may, at least, point out to every inquirer the *general situation* of the land. It may at least enable a person to say of some spot or point that it is comprehended within the tract affected by the warrant.(*x*) And further, that there is some reason to doubt whether the rule was not less strict before the revolution; since it appears, that the special warrants, in the years 1773 and 1774, seldom went further than to state the vacancy to be adjoining to some particular tract or tracts, either naming them, or the person or persons in possession of them.(*y*) In a case where the special

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(*w*) Land Ho. Ass. 84.—(*x*) Land Ho. Ass. 401.

(*y*) FOWLER *v.* GOODWIN.—*8th April*, 1809.—KILTY, *Chancellor*.—The proceedings and the grounds of the *caveats*, as stated in the argument, have been fully considered, and notwithstanding the several objections made to these certificates, the Chancellor considers it as a point clear of any doubt, that the *caveats* cannot be sustained.

It appears that a special warrant was obtained by Goodwin, and others, on the 23d of May, 1774, to take up 400 acres of vacant land, stated to be adjoining to the following tracts of land, or some of them, viz. Nicholas and John, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th discoveries, &c. Several certificates, including those now in dispute, were returned in May, 1776; and patents thereon not having been issued, the present *caveats* were entered in September, 1807.

One of the objections stated by the caveator is, that patents were not taken out within two years, according to the 11th section of the orders and instructions in 1733. The Chancellor is not satisfied of the validity of this objection; nor is he informed

warrant called for five hundred acres "adjoining the west line of Gore," it was held, that the description "was sufficient to

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of any case in which it has prevailed. There is apparently still less force in the objection arising from the situation of the chain-carrier, as proved by the deposition of Samuel Hawkins, and also in the trifling errors in the phraseology of the warrant, which were mentioned in the argument. It would seem, therefore, that the point most relied on by the caveator, is the want of precision in the location, or as he expresses it, the location being too broad.

It is certainly the interest of every person who takes out a special warrant, to describe or locate the land as clearly and precisely as he can, in order to bind and secure it from the operation of other warrants; but there is no set form, or expression required in order to comply with the general rule, which (as laid down by the late Chancellor in 1793,) was, that the description of the warrant should suit none but the land contended for, and that it should be so full and certain as plainly to point out the intention. There is, however, some reason to doubt whether the rule was not less strict before the revolution, for it appears that the special warrants in the years 1773 and 1774, seldom went further than to state the vacancy to be adjoining to some particular tract or tracts, either naming them or the persons in possession of them.

In the case of Pumphrey *v.* Wallace, the reasons for allowing the *caveat* of the latter are not expressed, and can only be inferred from what appears on the papers; because it would be totally improper to take the opinion of C. Wallace, as expressed in his deposition, or that of any other person, as evidence of such reasons. Pumphrey's warrant was dated the 28th of December, 1792, and executed on the 6th of February 1793. But Wallace had taken out a warrant of resurvey on the 18th of January, 1793; so that the question must have been how far the location made in Pumphrey's warrant was binding, so as to prevent the operation of the warrant of Wallace, which bound all the contiguous vacancy, supposing it not previously secured. The vacancy in dispute consisted of cultivated land, as appears by the receipt of the treasurer for improvements; and it may be inferred, that the *caveat* was ruled good on the ground of the location in Pumphrey's warrant being vague and indefinite, as was decided in the case of Beatty *v.* Orendorf, in 1793, (*Land Ho. Ass.* 400,) in which the vacancy was also cultivated land, and the claim of Orendorf on a warrant of resurvey.

It is not, however, necessary in the present cases, to determine whether the location or description in the warrant, was sufficient to bind or secure the vacancy aimed at, or to say what would be the result of the facts established by the depositions and the surveys returned, because the several parcels of land returned in Goodwin's certificates do not appear to have been cultivated, or to have had improvements thereon; and therefore must be taken as uncultivated, and liable to be affected by a common warrant, and it will be observed, that two of the certificates returned by the caveator on his warrant, supposed to include the same land, are for uncultivated land, and the improvements on the other three are only a few fence logs.

It was stated in the argument, that the warrant was not a proper one—that it was neither a special nor a common warrant. But, although it was not simply a common warrant, yet it might be used as such, and the general tenor of special warrants was, and still is, to direct the surveyor to lay out the said quantity, be the same cultivated or otherwise. On this subject the following points appear to have been settled:—That a special warrant shall be allowed to do every thing which a common warrant might do;—that a special warrant may abandon its first intention, and may be used to affect any lands which may be affected by a common warrant, however distant they may be from the land described in the special warrant; and that, in such case,

bind the vacancy to a certain extent;" but it is not said how far.(*z*)

In the various instances put of describing the *general* situation; of referring to some spot or point comprehended by the tract; or to the particular line, or corner, or extremity of the tract to which the vacancy is contiguous, and of such a description being binding to a certain extent; it is not said, nor is it perceived to what extent the binding effect of the description would be allowed to go; nor even if that could be settled, is it perceived how the fact of such obligatory extent is to be ascertained and proved. It is certain that parol proof is wholly inadmissible for any such purpose.(*a*) It has been solemnly declared, that a warrant for one hundred acres, contiguous to a tract, of which the outlines are altogether twenty miles in length, cannot be thought to give an exclusive right to survey any one hundred acres contiguous to that extensive tract.(*b*) And it has been laid down with great attention as a rule, that if an angle of one tract runs up to or touches an angle, or even a side of another tract, there is no contiguity between that other tract and the land contained within the two lines forming the angle.(*c*)

In judicial proceedings involving the titles to land, the term *location* occurs very frequently; and its meaning varies with the subject spoken of. The word is used in speaking of a point or place of beginning, of a line, and of a whole tract. But in these cases, the meaning and the ideas conveyed are different. When the location of a *point* is the subject spoken of, an indivisible part of space, a spot, comprehending no superficial extent, is alluded to.

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it makes no difference whether or not the survey under a special warrant includes part of the land designated by the special warrant. It is well known that a common warrant binds or affects the land at the time of its location with the surveyor, and *a fortiori*, it must bind at the time of the actual surveys which, in these cases, was many years before the date of the caveator's warrant.

The application of the above principles to the matter in dispute, being sufficient for its decision, it will not be necessary to remark on some other grounds of defence which were urged by the counsel for Goodwin. But, with regard to the opinion of Mr. Callahan, the late register, concerning the certificates now *caveated*, as stated in the depositions of Oliver Cromwell, it is thought proper to declare explicitly, that such evidence of the opinions of that officer can have no possible influence in any case now to be decided.

It is adjudged and ordered that the aforesaid *caveats* be dismissed with costs.

(*z*) Mortland *v.* Smith, MS. 19th April, 1815.—(*a*) Beatty *v.* Orendorf, Land Ho. Ass. 402.—(*b*) Beatty *v.* Orendorf, Land Ho. Ass. 401.—(*c*) Whitford *v.* Jones, Land Ho. Ass. 413.

When speaking of the location of a *line*, an idea of the place of a certain longitudinal extension, limit, or boundary, is presented to the mind; but in contemplating that subject, we form no idea of space, or any superficial extent. We can, however, have no other idea of the location of a *tract* of land, than that it is a space, a superficial extension, an area, a surface comprehended within certain confines. The word *location*, in reference to a tract of land, must, therefore, always be attended with these ideas. It is a place of greater or less extent. It may be a small lot, or it may be spread out to an extent of many hundreds of acres. It is still an individual, entire location, or place small or large.

The term *location* is also often used in our judicial proceedings as synonymous with the word description. Thus it is said, that the location is uncertain, that it is ambiguous, or that it has a double aspect. The word in these instances evidently means, that the *description* of the place, the area, or the space of land is uncertain, ambiguous, or that it has a double aspect. Because the description of the land may have one or two aspects; it may be gratified in all its parts by being located in one position or another. But, it would seem to be absurd to say, that a place had a double aspect, or that it was a place which admitted of being put in one place, or in another place. Hence, in most, if not all instances, by ambiguity of *location*, uncertainty in the *description* of the location is really meant. For it is difficult to conceive how the location of any one piece of land can be deemed certain, or become known, in contradistinction to any other parcel, but by the accuracy of its description. The location or place of any one space or tract of land, it is most manifest, can only be distinguished from other spaces or tracts by the preciseness of its description. And that description does nothing towards the designation of a tract of land if it stops short of defining one whole and separate space or area.

By the rules for the direction of surveyors, the surveyor is required, upon the receipt of any common warrant, to note down in a book to be kept for that purpose, the time of receiving it, the quantity of acres included therein, the date thereof, and at what place the person who obtains it locates the same.(*d*) So that the entry of a special location in the surveyor's book, is substantially the same as the entry of a special warrant with the register of the Land Office. In regard to which it has been laid down, that if a

(*d*) Land Ho. Ass. 435.

special warrant, "accurately describes the vacancy, it effectually binds it against all subsequent warrants or locations;" and further, that "whatever may be done by a common warrant, may be effected by a special warrant of vacant cultivation. It makes no difference whether or not the survey under a special warrant includes part of the land designated by the special warrant. In fact, the important difference between the two warrants, is, that the special warrant, before survey, affects the land *accurately described in it.* The common warrant affects no land until it is surveyed, or located with the surveyor."(*e*)

In short, the designation of the land given in the special warrant, or the entry upon the surveyor's book, must be such a description of a space, an area, or a tract, as may be understood and ascertained by proof of the existence of the localities referred to; it must be such an one as will suit no other land, and be sufficient in itself without having any substantial matter supplied by parol proof.(*f*) This may seem to be requiring too great a degree of strictness; but it has long been the established law, and is not more rigid than a due regard to the public good requires. Certainty is the mother of quiet; and in nothing more so than in the titles to lands. The vacancy aimed at by a special warrant, is often embraced by two or more other tracts. A reported example of which may be found expressed thus: "about one hundred acres vacant lying in A. A. county, and adjoining or between a tract of land in possession of *J. Brown*, a tract of land belonging to *J. Hall*, and a tract of land in the possession of *J. McDonald.*"(*g*) So in another instance where a particular neck of land was described.(*h*) Other examples may be imagined. Suppose the tract of land called Bellevoir to lay along, and parallel for some distance, within half a mile of the river Severn, and the special warrant, were expressed in these words: "about two thousand acres vacant, lying in A. A. county, between the tract called Bellevoir and the river Severn." Or, suppose Browning's Spring to be situated a short distance west from the mouth of the stream called the Little Crossings, the general course of which was north and south, and the Panther Pen was a short distance west of the same stream higher up; and the description in the special warrant was thus: "about 200 acres vacant lying in Allegany county, west of and bounding on the Little Crossings, and between Browning's

(*e*) Hopper *v.* Coleston, ante, 322.—(*f*) Beatty *v.* Orendorf, Land Ho. Ass. 402. (*g*) Garretson's Lessee *v.* Cole, 2 H. & McH. 459.—(*h*) Land Ho. Ass. 87.

Spring and the Panther Pen." In no one of these descriptions is any course, distance, or line distinctly named; yet it is perfectly manifest, that each one specifies a space, or area of land, so very accurately, that it cannot be mistaken, and in a manner that cannot be made to suit any other land.

After what has been said, the description given in *Browning's* special warrant can scarcely require a single remark. It is deficient in every particular, and in fact amounts to nothing. It does not describe any space, area, or tract of land whatever. It does no more than designate points or spots; but whether by so doing it is meant to indicate the place where the outlines of a tract are to begin; or whether the quantity called for is to be laid off round them as the centre; or in what direction from them, is not said. But it will be difficult to conceive of a description which has more entirely excluded every idea of space, area, or tract, than that contained in this special warrant of *Browning*. For every purpose of giving title to any tract of land, it is a mere nullity. But allow to it every thing to which it can pretend; let it be considered as no more than a description of the place of beginning; and then, even to that extent, it can now be of no avail to the party; since it appears by the certificate of survey, that the boundaries have not been commenced at the place thus specified; and the survey not having pursued the description given, it is in itself a total abandonment of every special pretension under the warrant.(*i*) As to the nature and sufficiency of the description of the place of beginning, which *Cunningham* caused to be noted down on the surveyor's book, nothing need be said, as he has not relied upon it for any purpose. It appears from the plot returned, that *Browning's Hunting Ground* runs entirely across *Cheviot Dale*. *Browning* may, therefore, have his certificate so amended as to comprehend either parcel of land within the lines of his present certificate, which is not covered by *Cheviot Dale*.(*j*)

Whereupon it is adjudged, that the *caveat* of *James Cunningham* be and the same is hereby ruled good as to the whole extent of *Browning's Hunting Ground* comprehended within the lines of the tract called *Cheviot Dale*. And it is further adjudged, that *Meshak Browning* have leave so to amend his certificate as to exclude all the land lying within the tract called *Cheviot Dale;* and that the said *Browning* pay all costs.

(*i*) Land Ho. Ass. 472, 480.—(*j*) Garrettson *v.* Cole, 1 H. & J. 374.

CHASE *v.* MANHARDT.

On a motion to dissolve an injunction on the coming in of the answer, the facts only as set forth in the answer are to be considered as established, not the opinions or reasoning of the party; and therefore, where a defendant insisted upon a claim to a certain amount, according to certain proceedings which, of themselves, showed that it could not have amounted to so much; it was held, that the facts so shown by the defendant himself could not be overruled by any thing he had alleged as being, in his opinion, a correct conclusion of law from them.

Where there is an agreement to allow for payments, or a verdict has been taken by surprise or mistake, it furnishes a ground for the interference of a court of equity; but if the mistake can be corrected in this court, a new trial at law will not be ordered.

Where it is admitted by the answer, that there still remains a dispute between the parties, the injunction is always continued until the final hearing.

Where in a contract between A and B alone, A stipulated to pay a sum of money to B, upon condition, that he made an assignment of certain property to A, and delivered the assignment to C, before a certain day; it was *held*, that A was to be considered as the contracting party, who alone could dispense with the condition.

Where a party bound himself to secure the payment of money, by giving his notes payable so many days after date, but failed to do so; it was *held*, that the debt should bear interest from the time the notes, had they been given, would have fallen due.

Interest is paid for the use or forbearance of money; and therefore, where a debtor is prevented by law from making payment, or cannot pay, because of any public calamity, such as that of a public war, he will not be charged with interest.

But an attachment laid in his hands, as a garnishee, does not prevent him from bringing the money into court so as to stop interest; and therefore, if, as garnishee, he contests the plaintiff's claim, either in his own right, or as an ally of the defendant, he will be charged with interest.

If a creditor, in any manner, receives only the principal of his debt, so as not to relinquish his claim to the interest then due, he may afterwards recover the interest as if it were a part of the principal.

In some cases, a party may be relieved from the consequences of a fraud which has been practised upon a third person.

This bill was filed on the 30th of December, 1818, by *Samuel Chase* against *Christian L. Manhardt*, and others; in which it is alleged, that the defendant *Manhardt* had obtained a judgment against *James Bryden* for a large sum of money, upon which he had sued out an attachment, and had it laid in the hands of this plaintiff *Chase*, as garnishee of the defendant *Bryden;* upon which attachment *Manhardt* had, by surprise and fraud, obtained a judgment of condemnation against the plaintiff for an amount which he did not owe to *Bryden*. Whereupon the plaintiff prayed for an injunction to stay execution upon the judgment, and for such relief as the nature of his case required. After which the plaintiff filed an injunction bond, when, on the 16th of January, 1819, an

injunction was granted as prayed. Some time after the defendants, having answered, gave notice of a motion to dissolve the injunction. The particular circumstances of the case sufficiently appear in the opinions delivered by the Chancellors.

31*st March*, 1821.—KILTY, *Chancellor*.—The motion to dissolve the injunction in this case, came on to be heard according to notice, and was argued by counsel for *Manhardt*, (the said counsel having also been made a defendant;) and by the complainant in proper person.

On considering the bill, answers and exhibits, I am of opinion, that the equity of the bill is not denied or destroyed; and that the defendant *Manhardt* is not entitled to a dissolution of this injunction. It is apparent from the answer of *Manhardt*, that he relies on the verdict, or his statement of the course of law by which the sum due from the complainant was ascertained, for the amount thereof; which amount he was clearly mistaken in. His debt against *Bryden* was $6654, in 1818; making, with the interest, $9326 62. But *Chase's* debt to *Bryden* could, at most, have been only $6000, with interest from 1812. And it was admitted in the argument, that there was a mistake of several hundred dollars by the jury's finding a verdict for the sum due from *Bryden*, instead of the sum due from *Chase* as garnishee. *Manhardt* states his information and belief, that the verdict and judgment at law were obtained upon a full and fair trial upon competent evidence; and he denies, that he authorized his counsel to relinquish any part due on the verdict.

As to the first point, it appears from the answer of *J. Purviance*, Esq'r, to which no objection has been made, that the trial was not a full one, nor in the ordinary course where a serious opposition is intended; but that he permitted a verdict to be entered for what he supposed to be the balance of principal and interest; and not alleging, that he was regularly the counsel of the complainant, though he was of *Bryden*.

And as to the second point, *J. Purviance* states in his answer, that he was ready to wait on *D. Hoffman*, Esq'r, counsel for *Manhardt*, to correct any errors, and *D. Hoffman* states his belief, that he informed the complainant the excess, if any in the verdict, would not be claimed; which, as counsel for *Manhardt*, he had a right to do. And it appears by his answer, that the verdict was rendered for the amount supposed to be due, to wit, $6654, principal, with interest from 1808, which were the sums due from *Bryden*

to *Manhardt*, and not the sum due from *Chase* to *Bryden*. This part of the answer is not a denial of the equity of the bill in that particular.

It is true, that the present complainant had it in his power to contest the suit more fully than he has done, and if he was concluded by his neglect, there would be an end of the case. But wherever there is an agreement to allow for payments or deductions, it furnishes a ground for the interference of a court of equity. And so where a verdict is entered by surprise or mistake, the latter of which is admitted in this case. And the Court of Appeals has gone much further in relieving against the verdict of a jury, or the confession of judgment.

In noticing the answers of the counsel in the suit at law, I have to observe, that I am not satisfied as to the necessity of making them parties to this suit; and if they were proper parties, they were not bound to answer beyond what related to themselves. But as to all the answers, in a motion to dissolve an injunction, the facts set forth alone are to be considered as established thereby, and not the opinions or conclusions of law drawn by the defendants from the facts; much less the reasoning in them.

It is a ground of equity in the bill, that *Chase* was not bound to give his notes, or make payment of the $6000 to *Bryden*, until the previous conditions were complied with. The tender of value, &c. on behalf of *Bryden*, does not affect this equity, inasmuch as it was accompanied by a demand of the notes, which, after the attachment was laid, he had no right to demand. As to *Manhardt* himself, (independent of the verdict irregularly entered,) supposing the claim to have been such as could be attached, he had no right to be put in a better situation than *Bryden*, or to put *Chase* in a worse situation as to the debt, or as to the terms on which it was to be paid. If the injunction should now be dissolved, after deducting the excess in the verdict, as proposed by the counsel for *Manhardt*, the complainant might be left without remedy, if the instruments of writing, now filed, should be insufficient; which will be a question proper to be determined on final hearing. But the complainant claims also a deduction of the interest charged in the verdict; on which, though it was not considered as the ground for the injunction in the order passed, he has a right to a decision, as it is not admitted, but strongly contested.

This brings the case within the rule laid down in the suit by

Colegate against *Lynch*;(*a*) that when a proper ground for the injunction is admitted by the answer, and there still remains a dispute between the parties, the injunction is universally continued. Here the admission is made by the answer of *D. Hoffman*, read and relied on by himself as counsel for *Manhardt*, thereby removing the exception to it as evidence against *Manhardt*; and the mistake and overcharge was admitted by him in the argument, which would be within the same reason.

It is thereupon adjudged and ordered, that the injunction be and the same is hereby continued till final hearing or further order.

After this the defendant *James Bryden* died, and *Charles F. Mayer*, his administrator, was on the 1st of January, 1825, admitted as a defendant in his place, on an application in the manner prescribed by the act of 1820, ch. 161. After which the bill was amended by giving to it an additional prayer; and the commissions to take testimony having been returned, with the proofs taken, the case was by agreement set down for hearing and brought before the court.

6*th July*, 1827.—Bland, *Chancellor*.—This case standing ready for hearing, and having been taken up at this time by consent, the parties were fully heard, and the proceedings read and considered.

The late *Samuel Chase* on the 26th of February, 1806, leased that property in the city of Baltimore, called the Fountain Inn, to *James Bryden*, for the term of fifteen years at the rent of $2000 per annum. And on the same day *Chase* gave to *Bryden* his bond, with a condition, that he, *Chase*, at the expiration of fifteen years from that day, and not before, and at any time within one year from the expiration of that term, and not afterwards, upon the payment to him, by *Bryden*, of the sum of $17,500, would convey in fee simple to *Bryden* that property. *Bryden* entered upon, and held the property accordingly. On the 11th of December, 1807, *Bryden* leased it to *John H. Barney*, at $3000 per annum for ten years from the first of April, 1808. Under this lease *Barney* entered and held as the lessee of *Bryden*, and sub-tenant of *Chase*. After which *Samuel Chase* the original lessor died; and the present complainant, and *Richard M. Chase*, it seems, became the holders of all the estate and interest in this property, which had belonged to the late *Samuel Chase*, but when or how does not appear.

(*a*) 2 H. & J. 34.

In this state of things, on the 26th of March, 1812, this complainant agreed to give *James Bryden* $12,000, for his interest in this property, the half of which he then paid to *Bryden*, and on the same day stipulated for the payment of the other half in these words: "I agree that on *James Bryden's* delivering to me of the original bond of my late father *Samuel Chase*, dated February 26th, 1806, duly assigned to *Richard M. Chase*, and also procuring Mrs. *Margaret McIntosh* of New York to assign and make over to the said *Richard M. Chase* a release of a mortgage given by the said *James Bryden* to her late husband; and also giving the said *Richard M. Chase* a good title to the lots and houses in the city of Baltimore, mentioned in the said bond, and also on his assigning to the said *Richard M. Chase* the original policies of insurance on the said houses: to give him good negotiable notes for the sum of $6,000 payable six months thereafter." This is the contract referred to in the bill as exhibit A; that referred to as the *receipt* exhibit B, is not among the papers; and, as it was not noticed in the argument, it is presumed was considered wholly unimportant. It is not any where distinctly stated or shown from what time *Barney* was to be considered as the tenant of *Chase;* but it would seem, that it was from the first of April 1812, as *Barney* says he paid the whole of his rent to the end of his lease from that day to the complainant *Samuel Chase.*

In October, 1808, the State for the use of *Christian L. Manhardt*, one of these defendants, obtained a judgment in Baltimore County Court, against *James Bryden*, for the sum of $10,035 95, to be released on the payment of $5,018 82, with interest from the 1st of October 1803, and costs. Upon this judgment an attachment was issued, and returned to March term, 1809, laid in the hands of *John H. Barney* as garnishee, and at March term 1811, the sum of $1,002 40, was condemned in his hands, but without costs. This attachment was renewed and returned to October 1811, laid in the hands of *John H. Barney*, as garnishee, and judgment was rendered against him for $494, without costs, at March term, 1812. An attachment was then again immediately sued out on the same judgment; and, as it would seem, some time previous to the 17th of July following, was laid in the hands of the complainant *Samuel Chase*, and so returned to the ensuing September term. This case was afterwards continued, from term to term, until March 1817, when it was entered, "continued to await the decision in a cause in chancery." And at the following Sep-

tember term, on the plea of *nul tiel record*, judgment was rendered for the plaintiff; and an issue having been made up on the plea of *nulla bona*, there was a verdict on it and judgment rendered for the plaintiff on the 13th of October 1817, against the garnishee *Chase* for the sum of $9326 62. Upon which judgment an appeal was prayed and granted. And on the 29th of June, 1818, the judgment was affirmed by the Court of Appeals.

It appears, that the complainant *Chase* was consulted as to the nature of the papers and documents which he wished to obtain by his contract of the 26th of March, 1812;—that they were prepared and executed agreeably to instructions which he himself gave; and after the attachment had been laid in his hands, on the 17th of July, 1812, they were tendered to him; and offered to be delivered, upon his giving his notes for $6000, payable in six months thereafter; which notes he refused to give, *because of the attachment which had been laid in his hands as garnishee of Bryden;* choosing rather to await its judicial termination. It was never proposed to deliver the papers on obtaining judgment on the attachment; nor did *Chase* ever offer to give or suffer judgment on receiving the papers; nor did he object in any manner to the sufficiency of the deeds, that had been tendered. Indeed, so far from it, on being expressly asked, if he had any objections to them, he replied he had none.

When the jury was sworn to try the issue on the plea of *nulla bona*, the papers, which *Bryden* had stipulated to deliver, were produced; to show that he had complied with the contract on his part; and that, in consequence thereof, *Chase* had become his debtor for the sum of $6000, with interest thereon. And it being believed and supposed, by the attorneys, *David Hoffman* and *John Purviance*, (for they alone conducted the trial,) that the principal and interest of the debt due from *Chase* to *Bryden* amounted to $9326 62, the jury were permitted or directed to find a verdict for that sum; upon which a judgment was rendered.

Soon after this judgment was obtained, *Chase* complained to *David Hoffman*, the attorney for *Manhardt*, and also to *John Purviance*, that it had been obtained for much more than was really due, even if he were chargeable with interest; but that he ought not to have been, and could not lawfully be charged with interest at all, according to the terms of his contract. Upon which those attorneys both insisted, that he was chargeable with interest from the date of the purchase. But they agreed, that if it should appear

on a calculation and review of the proceedings, that he had been charged with too much, the excess should be remitted. Indeed they admitted, that there was an excess which had occurred by mistake; which error should certainly be corrected. *Chase* did not then assert, that he owed nothing to *Bryden;* or that, according to the terms of his contract, he could not, at that time, have been legally considered as the debtor of *Bryden*. It was not until some time after, that he objected to a judgment having been rendered, at that time, for either principal or interest, on the ground, that *Bryden* had failed to comply with the contract on his part.

It appears, that the policies of insurance had been regularly transferred by *Bryden* according to the terms of the contract with *Chase*, on the 11th of April, 1812; and that the papers alluded to in the contract of the 26th of March, 1812, were retained by *John Purviance* for some time, and are now filed in this case as exhibits referred to in the answer of *David Hoffman*.

These facts and circumstances have been collected from the bill, answers, exhibits and proofs; they are all that have any material bearing upon the matter now in controversy; other particulars will be noticed in the course of the investigation.

It does not appear, from any thing in these proceedings, what was the nature and extent of *Richard M. Chase's* interest in the property called The Fountain Inn; but it is quite certain that the contract of the 26th of March, 1812, was made between this complainant *Samuel Chase* and *James Bryden* only;—that no other persons were immediately parties thereto. The complainant says in his bill, that he agreed with *Bryden* to purchase of him that property; and in the agreement itself he says, "I agree that on *James Bryden's delivering to me*," &c. Hence it is clear, that, although the assignment and releases were to be made to *Richard M. Chase*, yet when so made they were to be *delivered* to the complainant *Samuel Chase*. And further, that on *Bryden's delivering* those papers to *Chase* he would give *Bryden*, "good negotiable notes for the sum of $6000, payable six months *thereafter*." Whence it is perfectly clear, that the delivery of the specified papers was that act to be done by *Bryden*, which was to bind *Chase* to him unconditionally as his debtor. Consequently, it was the contracting party *Samuel Chase*, alone, who could insist on the performance of it as a condition precedent. It was he alone who could dispense with it as a preliminary act, or waive it altogether. Does it then appear, that this act has been either performed, par-

tially dispensed with, or altogether waived so as to make *Chase* the debtor of *Bryden;* and when?

From all the pleadings and proofs it is clear, that the complainant acquiesced in the fact, and acted upon the conviction of his having become legally and properly the debtor of *Bryden* in the sum of $6000 from the 17th of July 1812, when the papers were tendered to him. He was right in refusing to give his notes at that time, *because of the attachment.* It was not, however, the giving of his notes, which alone could fix him as the debtor of *Bryden;* but the delivery of the papers, or his dispensation with that delivery, either as a condition precedent or altogether. *Chase* did not reject the performance proffered to him by *Bryden;* because it was partial, or at all defective in its nature. On the contrary, he expressly said he had no objections to make to it; and rested his non-compliance, on the pendency of the attachment; and nothing more. From the position he then assumed, it manifestly appears, that he waived the delivery of the papers as a condition precedent; and relied upon his contract alone, considering it as an independent agreement, by means of which he might obtain them. He might then have taken the ground, that the delivery was a condition precedent; or he might have offered to deposit the money in court on those papers being delivered to him; or he might have put that defence upon the record in the attachment case by a special plea, or in answer to the interrogatories propounded to him. But he did not do so. He must, therefore, be considered as the debtor of *Bryden* on the 17th of July, 1812, according to the terms of his contract.

Being perfectly satisfied of these facts, and that *Samuel Chase* did thus acknowledge and consider himself as the debtor of *Bryden* on that day; it is unnecessary to determine whether this claim of *Bryden's* was or was not such a debt as might have been attached in the hands of *Chase* as his garnishee; since *Chase's* whole course of conduct in the attachment case amounts to a total and absolute waiver of every objection on that ground.(*b*)

The next question therefore is, whether, according to the nature of the contract between *Bryden* and *Chase* he was chargeable with interest, and from what time? It has been insisted, that *Chase* ought to be charged with interest *from the date of his contract*, and

(*b*) Louderman *v.* Wilson, 2 H. & J. 379.

to sustain this position very great reliance has been placed upon a numerous class of cases, which show, that in equity a purchaser who takes, or has been let into possession and receives the rents and profits shall be charged with interest.(*c*) But none of those cases are like the one under consideration. Here it appears, that the lessor, *Chase*, purchased an outstanding claim from the lessee for which he paid $6000, down at that time, and stipulated to pay $6000 more, six months after the delivery of certain papers relinquishing that claim. Shortly after which time he was let into the receipt of the additional rent from the sub-tenant. It appears, therefore, that he was let into that receipt, by reason of the first payment. And, consequently, the second payment cannot be affected in any manner whatever by that change; even supposing it not to have been within the contemplation and purview of that contract by which it was stipulated to be made. Hence this question about interest must rest altogether and exclusively upon that contract, and upon that alone.

By this contract *Chase* was to give his negotiable notes payable six months after the delivery of the papers. All negotiable notes carry interest from the day they fall due. To this general rule there are few if any exceptions. Had not the attachment been interposed, it is to be presumed that this contract would have been fulfilled by each of the parties exactly, according to its terms. If so, the papers would have been delivered to *Chase* on the 17th of July 1812, and he would have then given his negotiable notes payable six months thereafter, which would have borne interest when they fell due, and not before. The attachment did not alter *Chase's* contract, or place him in any worse condition, than he would have stood before; it only commanded him to pay *Manhardt* instead of *Bryden;* and, although it obliged him to pay all, *principal and interest*, it could not compel him to pay sooner, or to pay more than he stipulated to pay *Bryden*. It is an established principle, that where goods are sold to be paid for by a bill of exchange, and the purchaser neglects to give the bill, the vendor is entitled to interest from the time the bill if given would have become due.(*d*) This covenant "to give good negotiable notes," in effect then, amounts to an express stipulation to pay interest from the

(*c*) Sug. Vend. & Pur. 354; 1 Mad. Chan. 441.—(*d*) De Bernales *v.* Fuller, 2 Camp. 428, note; Porter *v.* Palsgrave, 2 Camp. 472; Boyce *v.* Warburton, 2 Camp. 480.

day they would have become due if they had been given. Consequently *Chase* must be charged with interest from the 17th of January 1813, the day when the notes would have become due had they been given as they should have been, when the papers were tendered; and as it appears they would have been, but for the attachment; that is to say, from that day until the 13th of October 1817, when the judgment was rendered in the attachment case.

It thus appears sufficiently evident, that confining our consideration to the contract alone, *Chase* must be charged with interest. But it is said, that the attachment restrained him from paying the debt; and therefore, he cannot be burthened with interest during the continuance of that restriction. The legislature have declared, that a debt may be attached in the hands of a debtor before it is due.(*e*) And, consequently, in such cases, the plaintiff may obtain judgment before the debt becomes due with a stay of execution.(*f*) But they have said nothing about interest on any debt that may be attached. Whether the laying of an attachment of itself suspends the claim of interest upon the debt attached, is the question next to be investigated and determined.

All the other States of our Union have adopted a form of judicial procedure having the same object as the attachment of Maryland; and hence we may with as much, perhaps more, propriety deduce illustrations and principles from their adjudications upon this subject than from those of England. In every instance, however, it is conceived that such adjudications, whether American or English, must be received with caution; because of the dissimilarity of the judicial forms, and the differences in many particulars of the code upon which they are predicated.

A decision of the Supreme Court of Pennsylvania has been much relied on, in which it is laid down as a general rule, in that State, that a garnishee is not liable for interest while he is restrained from the payment of his debt by the legal operation of a foreign attachment.(*g*) This same tribunal has furnished us with an exposition of the reason of this rule. Where the creditor, (it is said,) cannot enforce payment, nor the debtor pay consistently with the law, or without disobeying its positive and unqualified injunctions, as by going into an enemy's country to make payment, the debt shall not carry interest; because interest is paid for the *use* or *for-*

(*e*) 1795, ch. 56, s. 6.—(*f*) Com. Dig. tit. Attachment, G.—(*g*) Fitzgerald *v.* Caldwell, 2 Dall. 215.

bearance of money. Therefore, where a person is prevented by law, as in that instance, during the revolutionary war, from paying the principal, he shall not be compelled to pay interest during the continuance of the prohibition. And upon this analogy and these reasons, it is said, that the garnishee shall not be compelled to pay interest pending the attachment;(*h*)—unless he has been guilty of fraud or collusion, or has himself occasioned some unreasonable delay; which is in no case to be presumed, but must be proved.(*i*)

Nothing can appear to be more just and equitable than, that when a debtor is positively prohibited from paying his creditor, or is prevented from doing so by the overruling calamity of war, he ought not to pay interest. Because in such case he is compelled against his will to become the holder or bailee of the money, at his own risk; and that too perhaps at a time and under circumstances when it may be very unsafe to use it, or utterly impossible to derive any benefit from the use of it. So far the reason is satisfactory, and applies as forcibly here as any where else.(*j*)

But in this State a garnishee, in an attachment case, is not thus absolutely tied up and restricted. He is not bound to hold the money at his own risk and against his consent, or longer than he chooses.(*k*) Now it is upon this very principle, of the existence of such a positive restriction, that the rule of the Pennsylvania law is based. It is, that the restriction imposed by attachment is altogether analogous to that prohibition imposed by a positive law, or a public war. This may be so there, but here it is otherwise.

I take it to be the established law of this State, that the defendant, in all actions founded on contract for the recovery of a debt, may have leave as a matter of course to bring the sum sued for into court; and thus put a stop to the further accumulation of interest and costs, at least for so much as he brings in.(*l*) In those cases where the debt carries interest according to law, the mere bringing of an action for the recovery of it does not suspend the accumulation of interest for a single moment. Because it is the duty of the debtor to seek his creditor and make payment; and if he fails to do so he is liable to be sued, and is chargeable with

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(*h*) Hoare *v.* Allen, 2 Dall. 102.—(*i*) Fitzgerald *v.* Caldwell, 2 Dall. 215.—(*j*) Dulany *v.* Wells, 3 H. & McH. 23; Court *v.* Vanbibber, 3 H. & McH. 144; Bordley *v.* Eden, 3 H. & McH. 167.—(*k*) Ross *v.* Austin, 4 Hen. & Mun. 502.—(*l*) Tidd, Prac. 561.

interest on the ground of his neglect. But if, being sued, he contests the claim, then he is chargeable on the stronger ground of his wilful opposition and denial of justice.

It is difficult to conceive what pretension a garnishee can have to stand in a better predicament than a defendant debtor. He is cited as a debtor; and is called into court certainly in that character, although not by that name and in that form. It is often said, that the object of our "attachment acts and practice," is to enforce an appearance. It may with as much propriety be said, that their intention is to compel a plea or any entry upon the docket. Their true and only object is to enable a creditor to obtain satisfaction out of any property found in this State belonging to his absent or absconding debtor; and for that purpose they have provided "a special auxiliary remedy for the recovery of debts:"(*m*) something analogous to which will be found to exist in every code whatever.(*n*) Hence it is evident, upon general principles, that a garnishee stands in all respects in a situation exactly similar to that of a defendant debtor; having the same rights and subject to the same liabilities. He may have leave, at any time, to bring the debt into court; and he is chargeable with interest from the time it becomes due until it is paid.

The positive provisions of our attachment act,(*o*) looks to and evidently sanctions this right or duty of the garnishee to bring the sum attached into court for the purpose of relieving himself from further responsibility and trouble. He may contest the claim made against him; but, if he does so, the act declares he shall be liable to costs;—whence it clearly follows, that by assuming the position of a litigating debtor he would, as in all other similar cases, be also chargeable with interest upon the debt. A garnishee may not only defend his own interests, as a mere neutral in the controversy between the plaintiff and defendant; but he may also assume upon himself the character of an ally of the defendant. He is allowed to plead and defend his rights for him, and in his behalf.(*p*) But if he thus contests the plaintiff's right to recover either as principal or ally in the controversy, the genius of our law, as well as the reason and justice of the case seem most strongly to require, that

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(*m*) Burk *v.* McClain, 1 H. & McH. 236; Campbell *v.* Morris, 3 H. & McH. 535; Davidson's Lessee *v.* Beatty, 3 H. & McH. 594; Shivers *v.* Wilson, 5 H. & J. 130. (*n*) Rex *v.* Wilkes, 4 Burr. 2549; Manro *v.* Almeida, 10 Wheat. 473; 2 Bro. Civil Law, 333.—(*o*) 1715, ch. 40, s. 4.—(*p*) 1795, ch. 56, s. 4; Wilson *v.* Starr, 1 H. & J. 491.

he should be held answerable for the delay, and be charged with interests and costs.

In this case *Chase* pleaded, or suffered to be pleaded *nul tiel record*, and *nulla bona*. He thus opposed the plaintiff's right to recover as principal and as ally in the controversy. He assumed the hostile attitude and position of a litigating debtor in every point of view. He comes now, therefore, with an ill grace into a court of equity to ask to be exempted from bearing the burthen of that loss which was the necessary and inevitable consequence of the position he had assumed. This same creditor had, just previously, to obtain satisfaction of this same debt, made a similar demand by attachment upon *John H. Barney*, who brought his debt into court and was thereupon dismissed *without* costs. *Chase* should have profited by the example.

But, it is said, that the attachment placed *Chase* in the condition of a mere stake-holder; and that a stake-holder is never charged with interest. Such, however, is not the case here, in point of fact. These parties have not consented, that *Chase* should stand here between them, and keep this money as a mere stake-holder; nor has the attaching creditor forced him to assume and continue in that position. Because, the court of justice, before which he was cited, was open and ready to relieve him from that situation, whenever he thought proper to ask its protection. If without having had the money attached in his hands, it had been demanded of him by two or more persons, each of whom claimed a right thereto in opposition to the other, he might have filed his bill of interpleader, and been relieved from the risk of paying it to either. But he could only ask for such relief on bringing the money into court; for equity will in no case even listen to any such cause of complaint, so long as the party holds the money in his own hands.(*q*.)

Upon the whole then, it appears, that the rule laid down by the highest judicial authority of Pennsylvania upon this subject, is founded upon principles which have no existence in this State; and that the reasons of it are at variance with many of the well established principles of our law. Consequently, however just and beneficial the rule may be there, it cannot be considered as deserving the least regard in this State.

The case of *Quynn* v. *West*,(*r*) decided by the late General

(*q*) 1 Mad. Chan. 174; Spring *v.* S. C. Ins. Company, 8 Wheat. 268.—(*r*) 3 H. & McH. 124.

Court of this State, it has been strongly urged sustains the position, that an attachment does not of itself in all cases stop the accumulation of interest during its pendency. On the other hand, it is contended, that this case as reported is obscure, contradictory, absurd, and cannot be law. Let us examine it.

The case is this.—*Rutland*, in October 1786, obtained a judgment against *West*, which "was to be released on payment of £849 9*s*. 8*d*., *with interest from the* 31*st of October* 1786 *till paid*, and costs. *Mason* having obtained a judgment against *Rutland*, for £3234; on the 4th of August 1786, issued an attachment on his judgment which he laid in the hands of *West* on the said debt so by him due to *Rutland;* and on the second Tuesday of October 1788, *Mason* obtained a condemnation in the hands of *West*, of no more than the *principal and costs* mentioned in *Rutland's* judgment, leaving the *interest* thereon, from the 31st of October 1786 to the day of the condemnation, untouched. Upon this state of things the only question was whether *Rutland* could recover the whole interest during that time; a part of which had accrued pending the attachment. Upon which the court gave judgment for the plaintiff.

Now it is said here is an apparent absurdity;—because *Mason's* claim was large enough to cover the whole of *Rutland's* judgment including principal, interest, and costs; and yet *Mason* had only the *principal* and *costs* condemned, leaving the *interest;* that such a partial condemnation could not have been, because the law would not allow it. But there may be an attachment for part of a debt, which may be pleaded in bar *pro tanto.*(*s*) Why *Mason* attached only a part of this debt due upon *Rutland's* judgment does not appear; but he might, and it appears did do so, and obtained a condemnation for the principal and costs only. And, consequently, the court appears to have correctly decided, that the attachment was a bar only *pro tanto*, to the amount covered by the condemnation, and no more.

It has been also urged, that after the recovery or payment of the principal, a creditor cannot sue for and recover the interest. But if a creditor receives or recovers his principal debt in any manner so as not thereby either expressly or tacitly to relinquish his claim to the interest then due, he may as rightfully sue for and recover the interest then due, as if it were so much of the principal debt

(*s*) Com. Dig. tit. Attachment, G. & H.

itself which he had suffered to remain in his debtor's hands; for there is no more reason why the interest should not be recovered after the debt had been paid in a manner not to imply an abandonment of the interest; than that a party should not recover the mesne profits of land after he had obtained possession by means of an action of ejectment.(*t*)

Upon the whole then, although it may be admitted, that this case of *Quynn* v. *West* has not been so fully and perspicuously reported as it might have been; yet there is no just ground to charge it with absurdity, or to impeach the correctness of its principles in any way. By this decision it does most clearly appear to have been held, that *Mason's* attachment did not prevent the accumulation of interest upon *Rutland's* judgment during its pendency. There are no reasons given for this or any other of the positions, which are necessarily involved in the judgment the court pronounced.

But as to the reason and propriety of a debt's carrying interest during the pendency of an attachment, I entirely concur with what has been said by the Court of Appeals of Virginia. "In all such cases," it is said, "the safe and sound doctrine is, that if the party, though restrained from paying, holds and uses the money, (and we must presume he uses, if he continues to hold it,) he ought to pay interest; because the owner of the debt has a right to the interest; because money is worth its interest; and if the holder does not think so, he has always the privilege of bringing the money into court; and because, if the debtor could under this restraining process, hold the debt for years, without interest, it would offer a strong temptation to him, to stir up claims of this kind, and to throw all possible obstacles in the way of a decision of the questions raised."(*u*)

I am, therefore, satisfied as well by reason and analogy, as by direct authority, that an attachment has not the effect and operation of suspending any claim for interest, which exists independently of that judicial proceeding; and, consequently, that in this case *Chase* is properly chargeable with interest by virtue of his contract.

It has been urged, that *Manhardt* obtained a judgment against *Bryden* for more than he was entitled to. The court has not been

(*t*) Creuze *v.* Hunter, 2 Ves. jun. 162; Snowden *v.* Thomas, 4 H. & J. 337; Dixon *v.* Parkes, 1 Esp. Rep. 110; Tillotson *v.* Preston, 3 John. Rep. 229; Johnston *v.* Brannan, 5 John. Rep. 268.—(*u*) Templeman *v.* Fauntleroy, 3 Rand. 447; Tazewell *v.* Barrett, 4 Hen. & Mun. 259; Hunter *v.* Spotswood, 1 Wash. 145.

furnished with sufficient data to test the correctness of that judgment, even if it were now open to investigation. But it is stated in *Manhardt's* answer, and was not denied by *Bryden*, who was fully and actively represented, when the judgment of condemnation was obtained in the attachment case; nor is it now denied by *Bryden's* representative, who is a party to this suit, that *Manhardt's* judgment against *Bryden* amounted at that time to $9326 62. This matter must therefore be now considered as finally and conclusively settled. *Manhardt's* judgment against *Bryden* cannot now be questioned in any way; particularly by this complainant as garnishee; and in whose present bill there is no allegation which involves its validity and correctness. I therefore lay aside every thing that has been said upon that subject.

There can be no doubt, that this court may set aside a verdict that has been obtained by surprise or fraud, and grant a new trial. But, has there been any surprise or fraud in this case? By the docket it appears, that there was an appearance entered for the garnishee; and, that two attorneys were noted in the usual manner as appearing in the defensive. It is certain, that one of them, *John Purviance*, had his name thus entered for the purpose of protecting the interests of *Bryden*, the defendant, and of *Kyd*, who were his clients. It is also certain, that he put in the pleas of *nul tiel record*, in defence of *Bryden*, and *nulla bona* in behalf of the complainant *Chase;* and, that he had full, free and frequent conversations with *Chase*, the complainant, respecting the attachment while it was depending; who never once, in all that time, told him, that he, *Chase*, had any just grounds of defence for himself against the claim founded on his contract with *Bryden*. It is not distinctly shown for whom *Luther Martin*, the other attorney, appeared. But it is clear, that they were both willing, and either of them might have made for *Chase* any defence he might have instructed them to make. Indeed it appears, that interrogatories were propounded to him, as garnishee, which he answered;—and, consequently, that he not only had an opportunity to defend his interests in that cause, but was actually invited to spread his defence upon the record. Those interrogatories and answers are lost. The exceptions to the answers are, however, here; and among other things they say, that *Chase* did not file the original papers; and, that it did not appear with sufficient certainty, whether the balance of the purchase money due to *Bryden* was due from him, (*Samuel Chase*,) or from the said *Richard M. Chase.*

Hence it is very evident, that neither the original, nor a copy of his contract of the 26th March, 1812, could have been filed with his answers; and, that he certainly did not in those answers state, as a ground of defence, that he could not then be considered as the debtor of *Bryden*, according to the terms of that contract; because it had not then been performed by *Bryden* on his part.

The continuance at March, 1817, "to await the decision in a cause in chancery," alluded to a suit which had been instituted by *Manhardt* against *Bryden* and others, and is still depending in this court, to obtain an injunction to prevent *Chase* from paying or giving his notes to *Bryden* for the sum of $6000, which had been attached in his hands; and also to obtain certain disclosures in aid of the attachment suit. But it does not appear, nor is it alleged, that it was founded on any special understanding or agreement with this complainant, or that he was, in any respect, misled by any confidence he placed in that entry as a continuing and binding agreement. On the contrary, he says, "that he relied upon the said attachment's being continued as the said injunction was then depending." But he does not allege, nor does it in any way appear, that the continuance of the injunction involved, or embarrassed, or withheld from him any defence he might have made as garnishee in the attachment case, or that in consequence thereof he did not make any defence which he otherwise would have made. The fact is, that the injunction from this court, and the attachment at law, both operated upon *Chase*, the garnishee, in precisely the same way; the object of both was to prevent him from paying what he owed, to *Bryden* himself, and to have it paid into other hands. There is nothing which shows, that *Chase* was taken by surprise by any movement in either of those cases, or by proceeding in either pending the other.

Much has been said about the fraudulent and collusive conduct of *Manhardt*, *Bryden*, and *Kyd*. But it is not in any manner shewn how any of their alleged frauds or misrepresentations could or did affect the complainant *Chase*. It is admitted, that *Bryden* was indebted to *Manhardt;* and, that *Chase* was indebted to *Bryden*. Now, as the conduct of those persons did not in any way affect *Chase*, or charge him with more than he really owed *Bryden*, or enable *Manhardt* to recover more than he might lawfully claim of *Chase* as the creditor of *Bryden*,—it is exceedingly difficult to conceive how there could exist any fraud of which *Chase* could

have any just cause of complaint. Admitting every thing that has been said upon this subject to be true, it amounts to no more than this:—that *Kyd* and *Bryden* were disposed, if possible, to prevent *Manhardt* from having *Chase's* debt applied in satisfaction of his claim, on the ground, that it was not liable to be so applied, or that *Kyd* had obtained a prior assignment or lien upon it, and that *Manhardt* compromised matters with them in order to enable him, without further delay, to obtain some satisfaction by means of the attachment laid in the hands of *Chase*. It is true, that equity will in some cases relieve a party from the consequences of a fraud, which has been practised upon a third person. As, if the fraud practised upon *Manhardt* alone had by any consequence or recoil injuriously rested upon the interests of *Chase*, he might have asked and obtained relief from this court.(*v*) But in this case, the squib aimed at *Manhardt* did not reach, or at all affect *Chase;* he, therefore, can have no cause of complaint whatever upon that ground.

In fine I am perfectly satisfied, that *Manhardt's* judgment against *Bryden* cannot now be impeached in any way; that in obtaining the verdict in the attachment case, *Chase* was not taken by surprise; and, that there has been no fraud practised upon him. But that there was a mistake in the judgment of condemnation obtained against him is absolutely certain. Indeed it is admitted, that to some extent a mistake had been made, which it was agreed should be corrected. The nature and extent of that mistake is now perfectly ascertained in the manner and upon the principles I have explained. *Chase* was accidentally and erroneously represented as being indebted to *Bryden* to the full amount of *Manhardt's* judgment against *Bryden*, when in truth the fact was not so. This mistake must, therefore, be now corrected as was agreed. The staying of proceedings at law, upon the ground that judgment had been by mistake obtained for more than was really due, is quite a common case,—one which is often presented to this court. In such cases the verdict is never disturbed; or a new trial ordered.

Charging *Chase* with interest from the 17th of January, 1813, when the debt became due, to the 13th of October, 1817, when the judgment of condemnation was rendered, it appears that the

(*v*) Clifford *v.* Brooke, 13 Ves. 132; Chesterfield *v.* Janssen, 2 Ves. 156; Garretson *v.* Cole, 1 H. & J. 374.

whole amount then due from him to *Bryden* was $7706, and no more, leaving an excess of $1620 62. For the one amount, the judgment will be suffered to stand;—for the other, all further proceedings will be perpetually enjoined.

The bill prays, that the papers stipulated for by the contract of the 26th of March, 1812, may be now delivered to the complainant.

They have been brought in as exhibits referred to in the answer of the defendant *David Hoffman;* no objection has been made to their sufficiency; I shall, therefore, order them to be delivered accordingly. The defendants *Purviance* and *Hoffman* having been improperly and unnecessarily made parties, I shall dismiss the bill altogether as to them.

Whereupon it is *Decreed*, that the judgment of condemnation, in the proceedings mentioned, obtained by *Christian L. Manhardt* against the complainant *Samuel Chase*, as garnishee of *James Bryden*, is hereby permitted to remain in full force and effect in all respects whatever to the amount of $7706; and, as to that amount the injunction heretofore granted is hereby dissolved;—That as to the sum of $1620 62, the residue of the judgment, the injunction is hereby made perpetual;—That the register make out and file in this case correct copies of all the original deeds referred to in the answer of the defendant *David Hoffman;* and deliver the original deeds unto the complainant at any time he may demand the same, as the deeds specified and required to be delivered to him by his said contract, in the proceedings mentioned, bearing date on the 26th of March, 1812;—And that the complainant's bill of complaint as to the defendants *John Purviance* and *David Hoffman*, is hereby dismissed with costs;—And that the other defendants pay unto the complainant his full costs as against them to be taxed by the register.

GIBSON *v.* TILTON.

On a motion to dissolve an injunction, objections of every kind to the answer may be made, and are then in order; and it is a general rule, that if the facts on which the equity of the injunction rests are denied, the injunction must be dissolved; otherwise it must be continued to the final hearing.

An affidavit made in another State to an answer to a bill in this court, being an authentication called for by a tribunal here, is a part of the judicial proceedings of this State; and is not such a judicial proceeding, of another State, as comes within the provision of the Constitution of the United States, and the acts of Congress respecting the manner in which such proceedings shall be proved.

The sending of commissioners to other States to have testimony there taken; and, the having of answers in chancery, and the like, authenticated there, by affidavit or otherwise, has long been considered as one of the most common instances of the interchange of courtesies among the nations of Europe; and is a kind of comity which should be liberally extended among the States of this Union.

Although a person, who so testifies, or makes an affidavit abroad, cannot be proceeded against criminally here; yet a party here, who should knowingly use such spurious evidence, might be punished here for practising an imposition upon the court.

This bill was filed on the 2d of September, 1826, by *Fayette Gibson* against *James Tilton*, in which it is alleged, that owing to various circumstances, the defendant *Tilton* had recovered a judgment at law against the plaintiff *Gibson*, for a large sum of money which he had discovered was really and in equity not due to him. Whereupon it was prayed that an injunction might be granted to stay execution, and for general relief, &c. An injunction was ordered as prayed;—after which the defendant put in his answer, and gave notice of a motion to dissolve the injunction.

23*d July*, 1827.—Bland, *Chancellor*.—This motion for a dissolution of the injunction standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It appears, that the defendant is a resident of the State of Delaware, where, after subscribing his name to his answer, he swore to its truth, which acts are certified by the judge in these words:—"Sworn and subscribed this twenty-sixth day of April, A. D. 1827, before *Kensey Johns*, Chief Justice of the Supreme Court of the State of Delaware." To which is subjoined a certificate, in the usual form, by the clerk of New-Castle county, in the State of Delaware, that *Kensey Johns* was then Chief Justice.

It was objected, that the answer was insufficient; was not properly sworn to; and that the certificate was not in the form prescribed by the act of Congress of the 26th of May, 1790, ch. 11,

prescribing the mode of authenticating records and judicial proceedings from the other States of the Union. In answer to which it was urged that the answer was entirely sufficient, and that the latter objections could not now be made.

On the hearing of a motion to dissolve an injunction, objections of every kind to the answer may be made, and are then in order. Because, the motion itself, in its very nature, is founded upon the correctness, and sufficiency of the answer in every particular. Hence the plaintiff may, on the very day of hearing the motion, file exceptions to the answer, and have them then heard and decided upon. The defendant can have no cause to complain of surprise; because, by his motion he calls upon the plaintiff to show cause why, after having *well and sufficiently* answered the bill, the injunction should not be dissolved. And, having thus planted himself upon the *sufficiency* of his answer, at that time, and for that purpose, he stands pledged to sustain it in all respects; or he must fail in his motion.(*a*) All the objections that have been made are, therefore, now in season and must be decided upon.

The act, relied upon to show the insufficiency of the certificate, is one of those laws passed by Congress in pursuance of the power delegated to them, by the first section of the fourth article of the Constitution of the United States. That delegation of power enables Congress to prescribe the manner in which the public acts, the records and the judicial proceedings of every *other State* shall be proved, and the effect thereof, in *this* State. But, the affidavit, and certificate appended to this answer are not in any sense public acts, records, or judicial proceedings of Delaware. They are parts of a judicial proceeding of Maryland; such as have been called for, and authorized by the usage and law of Maryland, not of Delaware.

According to the long established practice of this court, in various cases, some of which have been recognised by legislative enactments,(*b*) it will act upon the evidence, derived from affidavits taken in a foreign country. Prior to the revolution a *dedimus* was always sent to obtain an answer from a defendant resident in any of the neighbouring colonies or in a foreign State,(*c*) and now commissions are often sent to other States of this Union,(*d*) and into

(*a*) Eden, Inj. 78; Alexander *v.* Alexander, MS., 13th December, 1817.—(*b*) 1797, ch. 114, s. 5.—(*c*) Chan. Pro. lib. D. D. No. J. folio 6, 59, &c.—(*d*) Hunt *v.* Williams, Taylor's Rep. 318.

foreign nations to take testimony where the commissioners must be sworn, by some magistrate of the place, before they can proceed to act. So an affidavit verifying the truth of an answer, made before a magistrate duly authorized to administer an oath in the country where the respondent resides, has long been admitted as sufficient. The acts of foreign magistrates, in all such cases, are however considered as having been done under the authority of this court; and as deriving their sanction from the judicial power of this State, not from that of the foreign State. For, standing unconnected in the foreign State with that to which they relate here, they would be there wholly unintelligible and inoperative. This interchange of courtesies, in aid of judicial proceedings, seems to be as common among the nations of Europe, as it is with the several States of our Union.(*e*) And in all such cases it would seem, that the comity of nations is carried so far, that the public functionaries will not only suffer the commission to be executed by the commissioners to whom it is sent, but if necessary, will compel a witness to appear and testify, so that his deposition may be taken, and returned to the tribunal of the foreign nation whence the commission emanated.(*f*)

The tribunals of this State have often found it necessary to ask the assistance of the judicial power of the other States of our Union or of foreign countries to procure testimony or obtain the means of administering justice. And in doing so those courts alone who ask or accept such assistance can have the authority to regulate its nature, form and extent. And they have accordingly laid it down as a general rule, that such acts, although varying in form in each case according to circumstances, must yet contain all the requisites essential to such acts when done here.(*g*) But the court, in such cases, is not called on to give any faith, or credit, or to pass any opinion upon the effect of a judicial proceeding of *another* State. If it were, then that matter having been regulated by the Constitution and laws of the United States, it certainly would be bound to submit to those regulations so far as they applied. But the question, how far this court will ask for, or accept of affidavits taken in *another* State, as the medium of that

(*e*) Dalmer *v.* Barnard, 7 T. R. 251; *Ex parte* Worsley, 2 H. Blac. 275; Omealy *v.* Newell, 8 East, 364; Hornby *v.* Pemberton, Mosely, 58; Gason *v.* Wordsworth, 2 Ves. 325, 336; Garvey *v.* Hibbert, 1 Jac. & Walk. 180; Braham *v.* Bowes, 1 Jac. & Walk. 296.—(*f*) Young *v.* Cassa, 3 Eccle. Rep. 417; Mitchell *v.* Smith, 1 Paige, 287; Mitf. Plea. 186, notes.—(*g*) Tidd, Pra. 156.

evidence without which it will not act, is one of a totally different nature from that, which involves the verity or effect of a judicial proceeding, which had been originated and completed entirely in *another* State; and with the formation of which it could have no concern. The Constitution, and act of Congress of the United States, therefore, can have no bearing upon the subject now under consideration.

With regard to the affidavit to this answer, it is certainly not couched in phraseology as full and exact as it ought to have been. But it is conceived to be expressed in terms sufficiently clear and strong to sustain a prosecution for perjury, if it had been made in this State, and the answer had been found to be false in any material particular. And although, as it would seem, no such prosecution could be sustained *here* upon a false oath taken in *another* State however correct and positive the affidavit might have been; yet the parties may, should the answer turn out to be false or the affidavit be ascertained to be spurious, be punished for practising an imposition on the court.(*h*)

These preliminary objections being removed, it appears, on a careful consideration of the answer, that it is, in all respects, sufficient; and that it has completely sworn away all the equity of the complainant's bill.

I know of no such rule as that which was insisted on by the plaintiff's solicitor; that where the *facts* on which the complainant's equity rests are alike within the knowledge of both parties; and the allegation of them by each in an opposite bearing is equally positive, the injunction must be continued. The rule is, that on a motion to dissolve, the facts on which the plaintiff's equity rests must be admitted or not denied, or he cannot obtain a continuance of the injunction. But if they are positively denied by the answer the injunction must be dissolved.(*i*) There may be exceptions to this rule, but this case is not one of them.

Whereupon it is ordered, that the injunction heretofore granted is hereby dissolved.

After which testimony was taken and the case brought before the court on a final hearing; when it appearing, that the plaintiff had failed to sustain his case by proof, by a decree passed on the 4th of November 1829, the bill was dismissed with costs.

(*h*) Omealy *v.* Newell, 8 East, 372.—(*i*) Eden, Inj. 86.

DORSEY *v.* CAMPBELL.

A purchased of B a tract of land, for which A stipulated to pay in bonds and notes endorsed by him, and for the eventual solvency of which he should be responsible. *Held*, that A must deliver to B such choses in action within a reasonable time; but could not do so after he had filed his bill against B, for a specific performance: And that B must use due diligence in collecting the choses in action so put into his hands; and should be allowed all proper expenses, to be deducted from the sums collected.

On a bill for specific performance, where the agreement is admitted or proved as set forth in the answer, no cross bill is necessary, but a decree may be passed against each party according to the extent of his liability—against the one directing him to convey the estate; and against the other ordering him to pay the purchase money.

The mode in which a purchaser of land under a *fieri facias* from this court may obtain possession, as directed by the act of 1825, ch. 103.

This bill was filed on the 16th of June, 1823, by *Clement Dorsey* against *James Campbell* and *John Ritchie*, to enforce the specific performance of an agreement. The bill states, that *Henry Anderson* had conveyed to the defendants two tracts of land in Charles county, which lands they had sold and contracted to convey, clear of all incumbrances, to this plaintiff; that as a means of making payment for the lands, it was agreed, that the plaintiff should assign to the defendants certain debts and choses in action; that he made the assignments accordingly, upon which the defendants had made collections and recovered judgments to the whole amount of the purchase money; and yet, that they had refused to execute and deliver a deed conveying the legal title of those lands to the plaintiff. Whereupon the plaintiff prayed, that the defendants might be ordered to convey the lands according to the terms of the agreement, and for general relief.

The defendants *Campbell & Ritchie*, on the 6th of December, 1823, put in their answer, in which they admit the contract as stated in the bill; but deny, that they had collected, or were then able to collect, the whole amount of the purchase money from the choses in action which had been assigned to them; that they had offered to convey, and were then, and always had been ready to execute a conveyance of the legal title, on receiving the whole amount of the purchase money; and that some of the choses in action, which had been assigned to them, and from which they had been utterly unable to collect any thing, they then held, and were ready to re-assign to the plaintiff.

After which the parties, by agreement, admitted sundry facts and some exhibits which had been previously filed; and the case was brought before the court for final hearing.

14*th January*, 1825.—Bland, *Chancellor*.—The arguments of counsel having been heard in this case, the proceedings were read and considered.

It appears, that *Campbell & Ritchie* being seized of two tracts of land, sold them, clear of all incumbrances, to *Dorsey*, for the sum of fourteen hundred and sixty-two dollars and fifty cents, to bear interest from the eighth day of June, 1815, when the purchaser was put into possession, until paid. So far the case admits of no difficulty.

As to the manner in which *Dorsey* was to make payment to *Campbell & Ritchie*, the receipt or agreement of the 12th of July, 1816, is expressed in these words: "And for which they are to be paid in bonds, notes, and other claims endorsed by *C. Dorsey*, Esq." And the assignment of the same date, made by *Dorsey*, is expressed in these words: "I hereby assign unto *Henry Chapman*, Esq., for the use of *Campbell & Ritchie*, the above causes of action, which are supposed to be correct, with an understanding and agreement, that I am responsible for their eventual solvency." The general expressions, "to be paid in bonds, notes, and other claims," without any distinct specification, can only be understood as an indication of the character of the fund which was to be placed by the plaintiff under the legal command of the defendants to the full amount of the purchase money. If *Dorsey* had failed or refused to place in the hands, or at the disposal of *Campbell & Ritchie*, choses in action to the full amount of the purchase money, then he would have been liable for the whole, or *pro tanto*, on the ground of a non compliance with his contract. If there had been nothing added to this general specification of the fund, out of which payment was to be made, the contract might have been considered in the light of an exchange or barter of one article of value for another, deemed to be of equal value,—a conveyance of land in consideration of an assignment of choses in action only, without the further responsibility of the assignor.

But the contract informs us, that the payment was to be made, "in bonds, notes, and other claims, *indorsed* by *C. Dorsey*, Esq.;" and also that *Dorsey* expressly says, "I am responsible for their *eventual solvency*." The fair, clear sense of these expressions removes every difficulty. *Dorsey* was to have the privilege of

paying out of a designated fund, to be placed in the hands, and at the disposal of *Campbell & Ritchie;* but he was to warrant, that, with due and proper diligence on their part in endeavouring to make it available, it would be ultimately productive to the whole amount of the purchase money. It does not appear, that *Campbell & Ritchie* are chargeable with any want of diligence in endeavouring to collect the money due on the choses in action transferred to them.(*a*)

It would seem, from the expressions of the contract, that *Dorsey* was to be allowed a reasonable time to assign, and deliver to *Campbell & Ritchie*, or their agent, choses in action, out of which they were to collect the amount stipulated to be paid to them; but that time has elapsed; and indeed, *Dorsey*, by bringing this suit has virtually waived the privilege of referring the defendants for payment to any choses in action in addition to those he had already transferred to them.

This case, then, stands thus:—*Dorsey* must be charged with the sum of fourteen hundred and sixty-two dollars and fifty cents, with interest from the eighth day of June, eighteen hundred and fifteen; first deducting therefrom the amount of the incumbrances on the land; that is, the judgment against *Anderson*, the former owner, and also the taxes due when *Dorsey* got possession. *Dorsey* is then to be credited with the sums actually received by *Campbell & Ritchie* from the choses in action transferred to them. And, since the object of this mode of payment was merely to prevent *Dorsey* from being called on until *Campbell & Ritchie* had used every proper exertion to make the specific funds available, *Dorsey* is only to be accredited with the net proceeds of the choses in action received by *Campbell & Ritchie*, or their attorney, after allowing every legal discount or set off, and expense of collection on each one. No expense or charge, however, is to be allowed for paying over any money so received, from the attorney of *Campbell & Ritchie* to them. But the credit is to be given to *Dorsey* as a payment on the day on which such proceeds were received, either by *Campbell & Ritchie*, or their attorney. If any of the debtors chargeable by the choses in action assigned by *Dorsey*, have been ascertained to be wholly or partially insolvent, he must be charged to that amount.

With these explanations and determinations as to the principles

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(*a*) Boyer *v.* Turner, 3 H. & J. 285.

of this case, it is hereby referred to the auditor, with directions to state an account accordingly, preparatory to a final decree.

In obedience to this order, the auditor, on the 16th of September, 1825, made a report, in which he stated the amount of the balance then due from the plaintiff to the defendants; to which the plaintiff filed no exceptions.

29th March, 1826.—BLAND, *Chancellor.*—This case standing ready for hearing, and having been submitted, the proceedings were read and considered.

This is a bill for a specific performance of a contract between the plaintiff and the defendants. From the agreement, as stated and admitted, it appears, that each party was bound to perform something for the benefit of the other. The plaintiff bound himself to pay to the defendants the whole amount of the purchase money; and the defendants bound themselves, on being so paid, to convey to the plaintiff the two specified parcels of land. It now appears that a part of the purchase money is still due; and that no conveyance of the legal title has been yet executed and delivered. In cases of this kind, according to the ancient course of the court, it was necessary to file a cross-bill, in order that each party might be decreed to perform that to which he had bound himself. But this circuitous and expensive course has, of late, been dispensed with in all cases where the plaintiff, by his bill, offers to perform the agreement; and it is admitted, or set out in the answer, and proved as thus set forth by the defendant. No cross-bill has for some time past been deemed necessary, either in England or in Maryland, in such cases; but a decree is passed in favour of each party for that to which he is entitled; upon the ground, that the whole matter in controversy has thus been well and sufficiently brought before the court, put in issue, and considered by such an original bill, answer and proofs.(*b*)

(*b*) Fife *v.* Clayton, 13 Ves. 546; Higginson *v.* Clowes, 15 Ves. 525.

WATKINS *v.* WATKINS.—This bill was filed on the 7th of November, 1798, by Tobias Watkins, an infant, by William Kilty his guardian. It states, that some time before the year 1770, an agreement was entered into between the late father of the defendant with the late father of the plaintiff, whereby the defendant's father contracted to convey to the plaintiff's father, a certain tract of land, and accordingly put the plaintiff's father into possession, which has been held by him and the plaintiff, his only son and heir, ever since; and that the purchase money has been paid, but the legal title has not been conveyed; that the defendant brought an action of ejectment for the recovery of the land, and threatens to turn the plaintiff out of possession.

Whereupon it is *decreed*, that the auditor's report be, and the same is hereby ratified and confirmed. And it is further *decreed*,

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Prayer for a specific performance, and that the defendant may be restrained by injunction from proceeding further at law. An injunction bond was filed. Injunction granted. The defendant answered, and proofs were taken, &c.

27*th March*, 1802.—HANSON, *Chancellor*.—This cause being submitted on the arguments in writing of the counsel, the bill, answer, depositions, with the said arguments and all other proceedings, were by the Chancellor read and considered.

Some of the material facts stated in the bill are neither admitted by the answer, nor established by the depositions. The circumstances of this case are indeed peculiar; and a cause recently decided in the High Court of Appeals, without explaining the principles of their decision, has rendered uncertain to the Chancellor what principles are to govern in cases where the performance of an old agreement is sought in this court. He would certainly be guided by the opinion of that court, if he knew it. Upon the whole he conceives, that the best thing he can do for the interests of both parties, and to render justice, and to put an end to controversy, is to recommend a reasonable compromise.

He then proposes a decree by consent, to the following effect, viz.—1. The injunction shall be made perpetual; and the defendant shall convey to the complainant and his heirs, all bis right, title, interest and estate in and to the land which is the subject of contest.—2. The complainant, on or before the first day of next October term, shall bring into court, to be paid to the defendant, the sum of one hundred and sixty-six pounds, thirteen shillings and four pence current money.—3. The defendant shall not be compelled to make the said conveyance until the bringing in or payment, or levying of the said sum. And if the said money be not brought in, as aforesaid, the defendant, at his election, may either have the process of this court, on application to the Chancellor, to enforce the payment of the said sum, with interest, from the said first day of October term, or shall be at liberty to have a writ or process from the court of law to obtain possession of the land, by him recovered by his ejectment, as stated in the bill, the injunction aforesaid notwithstanding: and the complainant shall be prohibited from any relief in this court, on the agreement stated in the bill. 4. Each party shall sustain his own costs in this court and in the court of law.

On the application, by petition, at any time, of either party, who shall hereby refuse to accede to this recommendation, the Chancellor, without delay will proceed to decree, according to the best of his judgment and conscience.

The defendant Nicholas Watkins assented to the terms proposed by the Chancellor. Upon which the following decree was passed.

30*th August*, 1802.—HANSON, *Chancellor*.—The defendant having fully acceded to the recommendation of the Chancellor, and pressed him to decree, he conceives, that there is no valid objection against decreeing according to the recommendation, although the complainant hath not acceded to it.

It is thereupon *Decreed*, that the injunction in this cause issued shall be, and it is hereby declared to be perpetual; and that the defendant, by a good deed, to be acknowledged and recorded legally, convey to the complainant Tobias and his heirs all his the said defendant's right, title and interest in and to the land in the bill mentioned, part of a tract called "Friends' Choice," as in the bill described. It is further decreed, that the complainant, on or before the first day of next October term, shall bring into court, to be paid to the defendant, the sum of one hundred and sixty-six pounds thirteen shillings and four pence current money. Provided nevertheless, that the said defendant shall not be compelled to execute the said deed until the bringing

that the complainant *Clement Dorsey* do, on or before the twentieth day of April next, pay to the defendants *Campbell & Ritchie*, or

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in as aforesaid, or payment to him, or the levying of the said sum by execution; and provided also, that if the said money be not brought in as aforesaid, the defendant at his election shall either be entitled to the process of this court, on application to the Chancellor to enforce the payment of the said sum, with interest from the said first day, or shall be at liberty to have a writ or process from the court of law to obtain possession of the said land by him recovered, as stated in the bill, the injunction aforesaid notwithstanding. And the complainant shall be precluded from any relief in this court on the agreement stated in his bill. Each party shall sustain his own costs in this court and in the court of law.

LONG *v.* GORSUCH.—This bill was filed on the 9th of September, 1802, by John Long against Richard Gorsuch; after which it was amended, introducing some new matter, and making John Gorsuch also a defendant. From the original and amended bill it appears, that on the 8th of November, 1800, the plaintiff Long entered into articles of agreement with the defendant Richard Gorsuch, by which it was stipulated, that Long should, in consideration of $1300, convey to Richard Gorsuch a house and lot in the city of Baltimore; and that Richard Gorsuch should convey to Long one hundred and fifty acres of land in Baltimore county, and all the grain then growing on it valued at sixty dollars; and one cow at fourteen dollars; and at the end of twelve months Richard was to pay Long the further sum of twenty-six dollars; which was to be in full payment for the specified consideration of thirteen hundred dollars. But if the tract of land should measure more than one hundred and fifty acres, then Long agreed to pay at the rate of eight dollars per acre for all above that quantity. And it was further agreed, that each of the parties was to put the other into possession. The bill alleges, that possession had been exchanged and given as agreed upon; but that the defendant Richard had, in fact, no more than a mere equitable title at most, and that the legal title to the land was then in his father the defendant John Gorsuch, who had been privy to the contract, and with a full knowledge of it, had stood by, knowing of the valuable improvements made by the plaintiff, without giving him notice, that he John then held the legal title. Upon which the bill prayed for a specific performance of the contract, and for general relief.

The defendants by their answers admitted the contract as set out, and averred, that they were then competent, ready and willing to make a good legal title to the tract of land sold; and in all respects to comply with the contract on the part of Richard Gorsuch; and prayed, that the plaintiff might be compelled to convey the house and lot as stipulated, and to pay for the excess in the tract of land according to the terms of his agreement.

A commission was issued and proofs taken; and a survey was ordered, which was executed, and a certificate and plot returned showing the number of acres contained in the tract of land lying in Baltimore county; after which the case was brought on for a final hearing.

18th March, 1815.—KILTY, *Chancellor*.—This suit being then on the trial docket was submitted at December term last by the defendant on an abstract filed.

It appears that the price of the lot in Baltimore, viz. $1300, was to be made up by land in Baltimore county, estimated to contain 150 acres, and to amount to $1200; and the other $100 in wheat in the ground, a cow, and $26 in money. And for every acre exceeding 150, Long was to pay Gorsuch at the rate of eight dollars per acre. The bill prays for a conveyance of the lands, or in case a good title can-

bring into this court, to be paid to them, the sum of eight hundred and twenty-two dollars and seventy-eight cents, with interest thereon from the first day of December, 1822.

And it is further *decreed*, that the said *Campbell* and *Ritchie* do,

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not be obtained, or there should be a deficiency, that the $1300 may be paid back. As the proceedings stand under the amended bill, the Chancellor does not perceive, that there is any defect of title, but is of opinion that justice may be done to the parties by decreeing mutual conveyances, and *also by compelling the complainant to pay for the excess*. A plot has been returned under the order of the court, by which the excess appears to be 62 acres, making at $8, $496. From which the $26 agreed on being deducted the sum due is $470. No exception has been made to the survey so returned; and therefore it is taken as the proper evidence for ascertaining the quantity. The complainant Long, having had the use of this excess of land, a claim for interest might on that account be made, but inasmuch as Gorsuch did not take any measures to have the land surveyed, and difficulties arose as to the title, it is deemed improper to allow such interest.

It is thereupon *decreed*, that the complainant, John Long, do on or before the tenth day of April next, pay to the defendant Richard Gorsuch, or bring into this court to be paid to him, the sum of four hundred and seventy dollars, and that he pay legal interest on the said sum from the said 10th of April 1815, if the principal should not then be paid. And also that the said complainant John Long, do by a good and sufficient deed to be executed and acknowledged according to law, convey to the defendant, his heirs or assigns, all that messuage or tenement in the agreement exhibited, dated the 8th of November, 1800, mentioned lying and being in that part of the city of Baltimore, called Fell's Point, fronting thirty feet on Anne street, and sixty feet on Lancaster alley, thence with the division line of said tract thirty feet, and thence with a straight line to the first place of beginning of the first thirty feet.

And it is further *decreed*, that the defendants, Richard Gorsuch and John Gorsuch, do by a good and sufficient deed to be executed and acknowledged according to law, convey to the complainant John Long, in fee simple, two hundred and twelve acres of land in Baltimore county, known by the name of Charles' Mistake, and the Resurvey on Cockpit, the same being the land mentioned in the agreement of the 8th of November, 1800, as containing 150 acres, together with the excess of 62 acres, appearing on the survey returned to the court, the part called the Resurvey on the Cockpit, being called therein Ellis' Folly. The said conveyance to be made on the payment or bringing in of the sum of 470 dollars, with the interest thereon as herein before decreed. The parties respectively to pay their own costs.

A copy of this decree having been served on the plaintiff as then required by the act of 1785, ch. 72, s. 25, and the amount not having been paid by him; on the petition of the defendant Richard Gorsuch, a *fieri facias* was issued in his favour, against the plaintiff on the 31st of August 1816, which was returned by the sheriff of Baltimore county, *nulla bona*.

The act of 1785, ch. 72, s. 21, declares, that in all cases the defendant may exhibit interrogatories to the plaintiff, which shall be answered by him, &c. A similar enactment in Kentucky has been so construed, that such interrogatories are in all respects regarded as a cross bill, and as superseding the necessity of filing such a bill as well in cases, like this, for a specific performance as in all others. *Wilson v. Bodley*, 2 *Litt. Rep.* 57.

by a good and sufficient deed to be executed and acknowledged according to law, convey to the said complainant *Clement Dorsey*, in fee simple, the two parcels of land called St. Clair and Recompense, lying and being in Charles county, and sold and conveyed by *Henry Anderson* to the said *Campbell & Ritchie*, and subsequently sold to the said *Clement Dorsey* by the said *Campbell & Ritchie*. The said conveyance to be made on the payment or bringing in of the sum of $822 78 with interest from the 1st of December, 1822, as aforesaid.

Upon this decree a *fieri facias* was issued on the 16th of November 1826, in favour of the defendants for the sum decreed to them against the plaintiff, which was levied on the lands specified in the decree; and they were sold and purchased by the solicitor of the defendants for their use for the sum of $710. After which on the 19th of January, 1828, the defendants filed their petition, stating these circumstances, and thereupon prayed, that the possession of the lands might be delivered to them.

21*st January*, 1828.—BLAND, *Chancellor*.—The petition of the defendants having been submitted without argument, the proceedings were read and considered.

It appears that the *fieri facias*, by virtue of which the land was sold, was returnable to March term 1827; but was not actually returned until the first day of September term of that year; and this application to have the possession delivered has not been made until after the end of the term then next following, or December term, which closed on the 15th of the present month.

The authority of this court to cause the possession of land, sold under its decree, to be delivered to the purchaser thereof, under certain circumstances, cannot be controverted; and the mode of proceeding in such cases has been well established.(*c*) But this

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(*c*) Dove *v.* Dove, Dick. 617; Same Case, 1 Bro. C. C. 375; Stribley *v.* Hawkie, 3 Atk. 275; The Commonwealth *v* Ragsdale, 2 Hen. & Mun. 8.

McKOMB *v.* KANKEY.—20*th March*, 1807.—KILTY, *Chancellor*.—The general power of the Court of Chancery to issue an injunction, directing possession to be delivered, is sanctioned by the practice in England and by our acts of assembly. The decree for possession and injunction is a process demandable of right as much as an attachment or other execution, and ought not to be refused where the power is considered to exist. An application for possession in such cases is founded on the general powers of the court, and on the act of 1785, ch. 72, s. 25, which provides that the Chancellor may cause by injunction the possession of the estate and effects demanded by the bill and petition, and whereof the possession or a sale is decreed to be delivered to the plaintiff or otherwise, according to the terms and import of such

is not the case of a sale of land under a decree. The relief which the petitioners seek can only be obtained according to the course of the common law, or in the manner prescribed by the late act of assembly.(*d*)

This is the first application which has been made to the Chancellor to enforce the delivery of possession according to the provisions of this act. It is declared, that whenever any lands shall be sold by virtue of any process of execution from the Court of Chancery; and the debtor named in the process, or any other person holding under such debtor by title subsequent to the date of the decree shall be in actual possession of the lands so sold, and shall fail or refuse to deliver possession of the same to the purchaser thereof, the court, on the application of the purchaser, and on no good cause *having been* shewn to the contrary by the said debtor, or other person concerned within the first four days of the term next succeeding that to which said process was returnable, shall issue a writ in the nature of a writ of *habere facias possessionem*, &c. commanding the sheriff to deliver possession of the said lands

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decree, and as the nature of the case may require. Under which last part of the clause the injunction may be modified to suit the particular case. In this case the lands had been sold to satisfy a mortgage. Before the bill was filed, but after the mortgage was made, the possessor had leased the lands of the mortgagor, for a term of years yet unexpired, he had covenated to erect a mill which he had built, and alleged that he besides made other permanent improvements. He objected that he ought to have been made party, that he ought to be allowed for his lasting improvements, and that having obtained the lease without notice of the mortgage, he had a right to hold possession. But the purchaser taking the title of both plaintiff and defendant, has obtained a right paramount to that of this occupying lessee who claims under the defendant, who could give him no right in opposition to that of the mortgagee whose deed had been duly recorded. This lessee must seek reimbursement for his improvements and other losses from his lessor in whose place he stood. Whereupon it is ordered, that the possession be delivered; and that an injunction be issued accordingly.

CHAPLINE *v.* CHAPLINE.—12*th July*, 1810.—KILTY, *Chancellor*.—The Chancellor has not fully made up his mind as to the power of the court to grant the injunction herein prayed; but supposing it to exist, he is not satisfied that it would be proper to exercise it at this time when it would be attended with the loss of the crop growing on the land. But it is ordered that an injunction be issued, in the manner which will then be directed, unless cause be shewn, or appear to the contrary during the first four days of September term next: provided a copy of this order be served, &c. before the 15th August next.

No sufficient cause having been shewn, an injunction was ordered on the 5th of October following.

(*d*) 1825, ch. 103; 1831, ch. 41.

to the purchaser thereof; without any saving or exception as to the then growing or unfinished crop of the occupying tenant, which, in favour of agriculture and for the benefit of the public, is almost always made by this court as well where the land is directed to be delivered by the decree itself to a party, as where it is ordered to be delivered to a purchaser from a trustee who made sale of it under a decree.(*e*)

This summary mode of proceeding by a purchaser to obtain the possession of lands which he has bought at a sale made by virtue of an execution issuing from the Court of Chancery, is thus specially and particularly described. And the time for showing cause why he should not be thus put into possession, is limited to the first four days of the term next succeeding that to which said process was returnable. This application has, therefore, been made according to the manner and after the time *allowed* for showing cause, for it is not made necessary for the applicant to call upon the occupant to show cause, as the public sale is assumed by this law to be a sufficient notice to him of the peril in which he stands; and the first four days of the term next succeeding that to which the

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(*e*) Rawlings *v.* Carroll, ante, 75; Wren *v.* Kirton, 8 Ves. 502; Sugden, Vend. & Pur. 42; Oland's Case, 5 Co. 116; Co. Litt. 55, b.

WRIGHT *v.* WRIGHT.—1716.—Decreed, that the defendant convey to the complainant, John Wright and his heirs, the land in dispute on his or their paying the defendant forty pounds sterling by good bills of exchange; and that she have liberty to finish the crop now upon hand; and that the said John Wright enter thereupon by Christmas day, but not to disturb her in the use of the houses until she has finished the shipping and packing the crop, and the use of the quarter in the interim. *Chan. Records, lib. P. L. folio* 292.

TAYLOR *v.* COLEGATE.—This was a creditor's bill filed on the 25th of March, 1803, by two of the creditors of John Colegate, deceased, against his six children and heirs, five of whom were infants. The bill states, that, being indebted, he died without leaving a sufficiency of personal estate to pay his debts; but that he held an equitable interest in certain parcels of land, which it was prayed might be sold to pay his debts. The defendants answered, and a decree was passed in the usual form, directing a sale to be made.

After which Elizabeth Colegate, the widow of the deceased debtor, filed her petition, in which, among other things, she stated, that she then, 12th May, 1804, had a quantity of wheat and rye growing on the land; which she had, by her own personal labour and the assistance of her neighbours, contrived to put in the ground the then last fall; that she apprehended the trustee would sell her grain then growing, with the land; whereupon she prayed relief, &c.

12th May, 1804.—HANSON, *Chancellor*.—On reading the petition of Elizabeth Colegate, the Chancellor thinks proper to declare, that it was not the intent of his decree, that the crop growing on the land of John Colegate should be sold with the lands; and that the trustee ought to announce to purchasers, that the crop is excepted.—*Chancery Records*, 1804, *p.* 151.

execution under which the sale was made was returnable, is taken to be a sufficient allowance of time to provide for his safety.

It is thereupon *Ordered*, that a writ in the nature of a writ of *habere facias possessionem* issue as prayed, according to the provisions of the act of Assembly in such case made and provided.

A writ of *habere facias possessionem* was accordingly issued and a return made upon it by the sheriff, that Mr. *Wills*, as agent of *Campbell & Ritchie*, had been put in possession.

HOWARD'S CASE.

A direction by a testator in his will, that his estate shall be valued and divided among his devisees by persons to be appointed by the Chancellor, amounts to no more than saying, that a partition may be obtained by bill in chancery; it cannot authorize a judicial proceeding *ex parte* by any of the devisees.

The recommendations of the parties and their solicitors may be heard as to the persons most suitable to be appointed commissioners to make partition of the estate.

George Howard and *Benjamin C. Howard*, the sons and executors of *John Eager Howard*, deceased, by their petition, filed on the 16th of November, 1827, stated, that their father had, by his last will, made on the 9th of October, 1827, devised his real estate to be divided among his descendants, as therein set forth; that they had made some progress in the payment of the debts of the deceased; and that although they had not fully satisfied all his creditors, yet as from the great difficulty in making a division of a large estate, situated as was that of the deceased, much delay must arise, they had deemed it advisable to apply, at once, for the appointment of commissioners, who might commence immediately to make the necessary preparatory examinations, &c. Whereupon they prayed, that commissioners might be appointed, &c.

So much of the will of the late *John Eager Howard* as is material to this case, is in these words: "It is my will and desire, that all my real estate which may remain after the payment of my debts, should be valued by persons to be appointed by the Chancellor of the State of Maryland; in which valuation shall be included all the real estate which I may at any time heretofore have conveyed to any of my children; rating the same at its present value, and

deducting therefrom the value of the improvements which have been made upon said property during its possession by my said children, or the possession of any other person under them; and that upon such valuation, the whole shall be divided by the persons to be named as aforesaid, into eight equal shares or parts, whereof each of my children, viz. *George*, *Benjamin C.*, *William*, *James*, *Sophia* now *Sophia Read*, and *Charles*, is to have one part, to them and their heirs for ever; and my grandchildren, *John Eager Howard*, the son of my deceased son *John*, and *James Howard McHenry*, the son of my daughter *Juliana McHenry*, now deceased, one share each to them and their heirs for ever; subject, nevertheless, as to the two last mentioned devises, to the following conditions, viz. that if either of my said grandchildren *John Eager Howard*, or *James Howard McHenry*, should die before arriving at the age of twenty-one years, then the share of such grandchild so dying is to go and revert to such of my children and grandchildren as may be alive at the death of such grandchild, in equal parts to them and their heirs for ever."

"In cases where I may have given bonds of conveyance for real property which I may have sold or contracted to sell, it is my will and desire, that my executors should be, and they hereby are fully authorized to execute all necessary deeds to complete said contracts."

17*th November*, 1827.—Bland, *Chancellor*.—It would seem, that the devisees of the residuum of the testator's real estate take in the manner and upon the terms specified, as tenants in common. The direction, that the Chancellor shall appoint the persons to make the division among them, amounts to no more than saying what the law had already said, that a partition of the estate so devised might be obtained by a bill in chancery. All concerned must be brought before the court, or have an opportunity of being heard; from which a majority of them would be precluded by the *ex parte* procedure proposed by this petition.

It may be inferred from this petition, that the parties concerned are anxious to have the estate of the deceased finally settled, and divided in the manner he has directed by his will. If so, a bill embracing the whole subject, and asking a partition, is the surest, cheapest, and most expeditious mode of proceeding that can be adopted. The defendants may answer at once, without waiting to be summoned; an account may be taken if called for; and a commission may issue, in the usual form, to divide the residue of

the real estate with as little delay as the nature of the case may require. This petition is entirely irregular and unsuited to what appears to be the object in view. Whereupon it is Ordered, that the petition be and the same is hereby dismissed with costs.

Afterwards, on the 2d of January, 1828, *George Howard*, *Benjamin C. Howard*, *William Howard*, *James Howard*, *Charles Howard*, and *James Howard McHenry* by his guardian and next friend *Charles Howard*, filed their bill against *William George Read* and *Sophia* his wife, and *John Eager Howard*, an infant, stating that the parties were the devisees of the real estate of the late *John Eager Howard*, as specified in his will. Whereupon the plaintiffs prayed that a partition thereof might be made among them.

The defendants *Read* and wife put in their joint answer, and the infant defendant answered by his guardian. They all admitted the facts as set forth in the bill, and united in praying for a partition. The plaintiffs recommended commissioners on their part, and the defendants having made a similar recommendation on their behalf, the solicitors of the parties were heard as to a proper selection from the persons put in nomination; and the case was submitted.

22*d January*, 1828.—Bland, *Chancellor*.—The said case standing ready for hearing, and being submitted, the bill, answer, and all other proceedings were, by the Chancellor, read and considered; and it appearing reasonable and proper, that partition should be made of the said real estate as prayed;—

It is thereupon *Decreed*, that there be a partition of the real estate whereof the late *John Eager Howard* died seized, among his said devisees, the parties to this suit, in the manner and upon the principles prescribed by his last will and testament; and for that purpose, all the real estate of which the said testator died seized, which may remain after the payment of his debts, shall be valued, together with and including all the real estate which he may have, at any time prior to the ninth day of October, in the year eighteen hundred and twenty-seven, conveyed to any of his said children, rating the same at its present value, and deducting therefrom the value of the improvements which have been made upon such property during its possession by said children; or while in the possession of any other person claiming under them; and upon such valuation, the whole shall be divided into eight parts. And to the end that this court may be enabled to make a just valuation

and partition thereof, in the manner above mentioned, it is ordered, that a commission issue to *Joseph W. Patterson*, *George Hoffman*, *Solomon Etting*, *James Mosher*, and *Stewart Brown*, of the city of Baltimore, authorizing them, or any three of them, to go upon, walk over, and survey the said real estate and property in the proceedings mentioned, and to value and divide the same in the manner above mentioned, according to the rights and interests of the respective parties; that is to say, the said commissioners, or any three of them, shall divide the same among the said *George Howard*, *Benjamin C. Howard*, *William Howard*, *James Howard*, *Sophia Read* the wife of *William George Read*, *Charles Howard*, *James Howard McHenry*, and *John Eager Howard*, who are the children, or grandchildren and devisees of the said testator; allotting to each one of them so much and such a proportion of the real estate of which the said testator died seized, as, together with that which the said testator conveyed to them, or any of them, the said devisees as aforesaid, will be equal in value to one-eighth part of the whole of the said real estate herein directed to be valued, having regard to quantity and quality, and deducting the value of improvements as above mentioned. But the said commissioners are not to include in the said valuation and division, any real estate of the said testator for which he may have given bonds of conveyance, or which he has sold, or contracted to sell, and for which his executors are authorized to execute all necessary deeds to complete such contracts as are mentioned in his said last will and testament. And that the said commissioners be directed, in the commission, to make out a plot and certificate of the said real estate; and of the divisions thereof, and an accurate description of the same and of the several parts thereof, and the value of each; and to the said commission there shall be annexed, as usual, an oath of office.

After which the commissioners made a return, that they had made partition of the real estate in pursuance of this decree, which, with the consent of the parties, was confirmed by a final decree in the usual form, awarding to each one of the eight devisees one share to be held in severalty.

COLEGATE D. OWINGS' CASE.

A suit, which had been instituted in the name of a person in her dotage, having been dismissed by her under the influence of the defendant, it was reinstated, and directed to be thenceforward prosecuted by her solicitor for her benefit.

It was ordered that she should be permitted freely to go and to reside where she pleased; and that if necessary a receiver might be put upon the estate to have its rents and profits applied to her maintenance pending the litigation.

The maxim of the English law, that no man of full age shall be, in any plea to be pleaded by him, received to stultify himself and disable his own person, examined, considered and rejected, as being inconsistent with the principles of the law of Maryland.

The indications and characteristic differences between the four kinds of *dementia*, called idiocy, delirium, lunacy, and dotage, as regarded by the medical profession and as recognised by the law, examined and considered.

Weakness of mind is a sort of mental imbecility approaching to the condition of *non compos mentis*, and analogous to childishness and dotage.

Imposition practised upon weakness by him who is confided in and trusted is, in law, the most odious species of fraud.

Where a person communicates his intention to make or alter his will, so as to give a legacy, or a portion of his property to an individual, and his heir, or any one else, interposes and prevents it by a promise to pay the legacy, to transfer the property, or to give an equivalent, such promise is binding, and may be enforced after the death of the testator or intestate, by the party in whose favour the promise was made.

There are various kinds of decrees other than those which operate directly in favour of the plaintiff and against the defendant; and when the whole of a complicated case has been brought before the court, such a decree may be passed as is best suited to its peculiar nature.

If the conveyance of an estate be necessary, and the party required to make it be incompetent to contract, a trustee may be appointed to execute the conveyance in his name.

Where a decree has been passed affecting both real and personal estate, and the case abates by the death of either party, for the purpose of having the decree entirely executed, it must be revived by or against the heir, as well as the personal representative of the deceased; but it may be partially revived by or against either of them.

This case was brought before the court by a bill filed by *Colegate D. Owings* against *Charlotte C. D. Owings*, on the 21st May, 1825, in which the plaintiff alleged, that she was then more than eighty-four years of age, and at a time when she was in a condition of extreme ill health, and altogether deprived of the proper use of her mental faculties, the defendant had fraudulently caused her to execute and deliver a deed dated on the 15th of June 1824, which purports to be a conveyance from the plaintiff of all her real and personal estate to the defendant; that the deed was made without any valuable consideration whatever, upon the false and fraudulent pretext that the plaintiff had promised to give by her last will and testament all her estate to the defendant. Upon which

the plaintiff prayed, that the deed might be annulled and cancelled, and for general relief according to the nature of her case.

The defendant by her answer denied, that the deed had been fraudulently or in any manner improperly obtained from the plaintiff, and averred, that the plaintiff, as her mother, had promised to her father, a short time before his death, to provide for her. In consequence of which, and in express reference to that promise, he had by his last will given the defendant a trifling legacy, and so, in effect, excluded her from all participation in his estate. Upon all which the defendant insisted, that the deed should be sustained, or that she should have secured to her the full benefit of the plaintiff's promise.

To this answer the plaintiff put in a general replication, and a commission was issued to take testimony; but before it was returned, the plaintiff, on the 31st of August 1826, came from Baltimore to Annapolis with the defendant, and by an order in writing, signed by her, directed the register to dismiss the bill, and it was dismissed accordingly.

On the 6th of November, 1826, the solicitors of the plaintiff filed their petition, in which they stated, that although the complainant was not a lunatic, yet she was incapable of transacting business or disposing of her property; and that she had declared, since her return home, that she went to Annapolis with her own lawyers; and instead of dismissing her bill, she is under the impression, that she has got all her property back, and that the deed to the defendant has been set aside; and the plaintiff's solicitors further allege, that the order for dismissing this suit had been procured by fraudulent practices and undue influence upon the plaintiff; and in support of their representation, they filed with it several affidavits. Upon all which they prayed to be heard; that the bill might be reinstated; that a guardian of the plaintiff might be appointed to prosecute the suit; and that such order might be passed as the nature of the case should require.

27th November, 1826.—Bland, *Chancellor*.—Ordered, that this application to reinstate the case stand for hearing on the fourth day of January next;—that depositions taken by either party on one day's notice may be read in evidence at the hearing;—that the Chancellor will at the hearing require the personal presence of the complainant for the purpose of informing himself upon the subject of this application; but he desires it to be distinctly understood, that the complainant must not be removed from home so as to subject her to great personal inconvenience, or so as to endanger the

health of one so advanced in years, and reduced by infirmities. The relation however in which all the parties concerned stand to the complainant will, it is believed, insure proper respect and attention to her personal comfort and security. And the register is directed to transmit a copy of this order to the solicitor for the defendant.

The taking of proofs and the hearing of this matter were several times postponed at the instance of the plaintiff's solicitors; and a further short delay having been granted by an order of the 29th March 1827, the matter was soon after that brought before the court.

17*th April*, 1827.—Bland, *Chancellor*.—The matter of the petition to reinstate this case standing ready for hearing, the solicitors of the parties were fully heard; all the proceedings and proofs were read; and the plaintiff, *Colegate D. Owings*, having been brought into the presence of the Chancellor, he interrogated and conversed with her as to the subject in controversy, and also on various matters having a tendency toward, or connected with it. All of which the Chancellor has deliberated upon and maturely considered.

The case is of a peculiar and extraordinary nature. It is not alleged, nor does it in any way appear, that at the institution of this suit any thing was done that ought not to have been done; or that this proceeding was an improper one with a view to the rights and interests of the plaintiff.(*a*) A cloud has been impended over the title to the property mentioned in the proceedings, which threatens to gather and thicken by delay. The means of dispersing it, the proofs in relation to the controversy, may be more entirely, readily, and cheaply obtained now than at any future period; therefore, justice as well as the peace and interests of all concerned, seem strongly to require that the suit which had been begun should be reinstated, and now prosecuted with as little delay as may be to a final decision upon its merits, as prayed by the petition.(*b*)

The order for dismissing it was given before the return of the commission for taking testimony; and, as it would seem, before all the testimony, pertinent to the matter and within reach of the parties, had been taken. For it appears, that some of the proofs collected under the petition might be brought to bear upon the principal case. I therefore deem it improper at this stage of the

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(*a*) Wartnaby *v.* Wartnaby, Jac. Rep. 377.—(*b*) 1 Coll. Idiots, 80; Holman *v.* Holman, 3 Desau. 210.

proceedings more fully to explain the reasons which have brought me to the conclusion, that the case should be reinstated, lest, in doing so, I might be supposed to intimate any opinion which should be reserved until the final hearing.

It is not my intention to say any thing as to the commencement of the decline of the mental energy of the plaintiff; or to speak of the lucid intellectual efforts she may be now capable of making; but, although it does not appear to be altogether settled according to the English authorities, that a writ in the nature of a writ *de lunatico inquirendo* can be issued against any one who is merely in a state of dotage,(*c*) I deem it proper to observe, that from the proofs of the present condition of the plaintiff's mental faculties, I shall regard her as completely under the especial protection of the court as she can be, short of her being formally placed under its guardianship by a regular course of judicial proceeding.(*d*) I shall expect, that she shall be subjected to no manner of improper restraint, or disagreeable influence, not indispensably necessary for her welfare. If necessary, and it should be asked, the rents and profits of the property in controversy may be applied, under the direction of the court, to her support and benefit, until a final decree can be had. And as an imbecile adult may be permitted to sue here by his next friend,(*e*) I shall allow this suit to be henceforward conducted by the solicitors, by whom it was instituted, in the name of this plaintiff; subject, however, to the control of the court, should there be any occasion for its interference.(*f*)

(*c*) Leving *v.* Caverly, Prec. Cha. 229; Wall's Case, cited 3 Atk. 173; Ridgeway *v.* Darwin, 8 Ves. 66; *Ex parte* Cranmer, 12 Ves. 446; *In re* Holmes, 4 Russ. 182; 2 Mad. Chan. 732.—(*d*) Donegal's Case, 2 Ves. 408; Wartnaby *v.* Wartnaby, Jac. Rep. 377; Whitehorn *v.* Hines, 1 Mun. 557; 1 Coll. Idiots, 65, 67. (*e*) 1 Mont. Dig. 39.

(*f*) Chambers *v.* Donaldson, 9 East, 471; Horner *v.* Marshall, 5 Mun. 466.

Rothwell *v.* Boushell.—In this case the bill stated, that John Boushell the defendant was deranged and incapable of managing his affairs, and prayed, that a guardian *ad litem* might be appointed to answer for him, &c. Afterwards the plaintiff by petition stated, that a writ *de lunatico inquirendo* had, some time since, issued, upon which it had been found and returned, that Boushell was a lunatic, and that a trustee had been appointed, who had failed to give bond as required; whereupon she prayed, that a guardian *ad litem* might be appointed.

13*th February*, 1819.—Kilty, *Chancellor*.—On considering the above petition, and finding on examination of the proceedings, that a bond has not been filed; and, that therefore there is not, in effect, any trustee capable of acting, it is thought proper, and within the powers of the court, to appoint a guardian as prayed. It is therefore ordered, that Thomas W. Veasy be and he is hereby appointed guardian for the purpose of answering for the said John Boushell to the bill of complaint of Ann Rothwell in the petition mentioned.

Whereupon it is ordered, that the said suit heretofore instituted in this court by *Colegate D. Owings* against *Charlotte C. D. Owings*, which was dismissed on the 31st day of August last by order of the said plaintiff, be and the same is hereby reinstated, in all respects, as it stood before it was so dismissed. And it is further ordered, that the commission with the testimony taken under it, which was returned and filed on the 6th day of November last, stand and be available in the said case, subject to all legal exceptions, in like manner as if the same had been returned and filed before the case had been dismissed.

On the 23d of June 1827, the solicitors of the parties by a writing signed and filed by them, agreed, that all the testimony which had been taken in relation to the application to reinstate the case should be used at the final hearing, in like manner as if it had been taken under a regular commission.

After which the plaintiff's solicitors filed a representation in which they say, that by virtue of the order of the 17th of April, they deem it their duty to state, that the plaintiff had been living in peace and comfort with her daughter Mrs. *Nesbit*, and on her leaving home to go to the springs for her health, the plaintiff had gone to reside with her daughter Mrs. *Goodwin*, where she had every attention and comfort she required; that on the plaintiff's expressing a wish to attend a camp-meeting, Mrs. *Goodwin* had gone with her, but found it necessary for the plaintiff to take shelter from a shower of rain, in the house of a neighbour, when, in the absence of Mrs. *Goodwin*, the defendant contrived in a rude and covert manner to have the plaintiff put into a carriage and conveyed to the city of Baltimore, and there placed her, against her consent, in a boarding-house, where she could not have those attentions, conveniences, and comforts of which, from her age and infirmities, she stood so much in need; that the defendant, independently of her want of means properly to support her mother, ought not, because of this controversy, to have the care of the plaintiff; and that the real and personal estate of the plaintiff had been and was then much neglected and exposed to waste and loss. Upon which they suggested, that the person of the plaintiff should be confided to the care of Mr. and Mrs. *Nesbit;* and that a receiver should be appointed to take care of her estate.

17th September, 1827.—Bland, *Chancellor*.—The Chancellor has read and considered the statement filed and submitted

this day by Messrs. *Winchester* and *Gwinn*, the solicitors of the plaintiff.

On passing the order for reinstating this case, it seemed doubtful whether the plaintiff was then in such a state of dotage as to warrant the issuing of a writ *de lunatico inquirendo*. Such a writ was not asked for by any one. The expression of an opinion to that extent therefore, was not then considered necessary; and it was deemed best to leave the question as to the commencement and nature of her mental imbecility, as regards the matter in dispute, to be determined at the final hearing. Upon mature deliberation it seemed at that time, however, to be within the scope of the powers of this court to protect the plaintiff, without the intervention of a writ *de lunatico inquirendo*, from all personal restraint, or undue influence in any way, or by any one; and also, by the appointment of a receiver, or otherwise, to protect the property in litigation from waste, and to have its proceeds applied to her support until the matter in controversy could be heard and determined. With a view therefore, as speedily as possible to release this aged plaintiff from all improper restraint, and of placing her in a condition of undisturbed comfort, and of having the property in dispute taken care of,

It is ordered, that any two or more of the medical professors of the University of Maryland, who have not heretofore expressed any opinion upon the intellectual condition of the said plaintiff *Colegate D. Owings*, be and they are hereby authorized and requested to visit and converse with her; and that she be permitted without the least molestation or undue persuasion whatever, from any one, forthwith, or at any time to go to and dwell in the house of any one willing to receive her, as may be thought proper or advisable by the said physicians, or a majority of them. And the said physicians shall as soon as practicable make report to this court of their proceedings, and of their opinion of the health and present intellectual condition of the said plaintiff.(*g*) And it is further ordered, that the matter of the said representation of the said solicitors be finally heard and disposed of on the twenty-third day of October next. Provided a copy of this order, together with a copy of the said representation be served on the said defendant, or her solicitor, on or before the twenty-fourth instant. Each party

(*g*) Ridgeway *v.* Darwin, 8 Ves. 67; *Ex parte* Tomlinson, 1 Ves. & Bea. 59; Shelf. Lun. 62, 399.

is allowed to take depositions before any justice of the peace, or the commissioners of this court in the city of Baltimore, to be read in evidence at the hearing of this matter on giving two days' notice as usual.

Nothing having been done under this order, the case was, on the 28th November 1827, ordered to stand for hearing at the then next December term, unless cause was shewn to the contrary; and no cause having been shewn, the case was brought before the court for a final decision.

20th February, 1828.—BLAND, *Chancellor*.—This case standing ready for hearing and having been submitted, without argument or notes, the proceedings were read and considered.

The bill charges, that the deed of the 15th of June 1824, was obtained by combination and fraud; which of itself, if true, would afford a sufficient ground for the relief prayed. But this allegation is especially bottomed upon the statement, that at the time the deed was executed, the plaintiff had been deprived of her intellectual faculties; and that she was then in truth entirely *non compos mentis;* either from great age, or by reason of the disorder under which she was then suffering. She makes her own incapacity the chief basis of her prayer for relief. But, according to a maxim of the English law, no man can be allowed to stultify himself for the purpose of avoiding his own deed.(*h*) If we are bound by this maxim; and it be an established principle of our law, it is evident, that every thing in this case, which can be considered as at variance with it, must be rejected; and we must be confined to that alone which relates to the allegations of fraud, in total exclusion of every thing respecting the plaintiff's personal disability occasioned by her alleged insanity.

The application of this maxim to this case, therefore, meets us here, as a preliminary inquiry. Can the unfortunate or afflicted party himself make his own insanity a foundation of relief or defence? Is it a principle or maxim of the law of Maryland, "that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself, and disable his own person?"(*i*) I have not been able to find any adjudged case, or other respectable authority, shewing in what manner this maxim has been received; or whether it has ever been adopted or rejected

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(*h*) Beverley's Case, 4 Co. 123.—(*i*) Beverley's Case, 4 Co. 123.

in this State. Therefore, whether it ought to be now received, or rejected, must depend upon the nature of the reasons and the policy by which it is sustained.

In England, it is said, that the progress of this *notion* is somewhat curious; and although it has been handed down as settled law, yet, that later opinions, *feeling the inconvenience of the rule*, have in many points endeavoured to restrain it.(*j*) This maxim has received the entire approbation of few of the English lawyers, and, by many of them, it has been not only questioned, but severely reprobated.(*k*) It is alleged to have been set up in defiance of natural justice and the universal practice of all the civilized nations in the world.(*l*) It has been shewn from the most unquestionable authority, that the ancient common law, without deviation, down to about the year 1330, recognised the right of the party himself to rely upon and prove his own insanity as a means of avoiding any contract made during his insanity;(*m*) and in a case which was decided about the year 1420, it appears that the plaintiff was permitted to allege as the ground of the relief he asked and obtained, that he was of great age, and that his discretion many times, and for the most part, had passed away from him, and that the bargain had been made when he was out of himself.(*n*) It is said by one of the most eminent of the English judges, sitting in an ecclesiastical court, that it is perfectly clear in law, that a party may come forward to maintain his own *past* incapacity, and also that a defect of incapacity invalidates the contract of marriage, as well as any other contract.(*o*) After the most solemn and deliberate investigation, this maxim has been rejected in Connecticut; and in New York and Virginia it seems to have been put aside as unworthy of the least consideration or notice.(*p*)

Mere weakness of mind alone, without imposition or fraud, forms no ground for vacating a contract. But if there be any unfairness in the transaction, then the intellectual imbecility of the party may be taken into the estimate, to shew such fraud as will afford a ground for annulling it. Courts of justice disclaiming all pretension to measure men's capacities, recognise no legal distinc-

(*j*) 2 Blac. Com. 291; Thompson *v.* Leach, 3 Mod. 301; 1 Ld. Raym. 313; 2 Stra. 1104.—(*k*) 1 Coll. Idiots, 406; Coop. Med. Jur. 377.—(*l*) 1 Fonb. 48. (*m*) F. N. B. 466; 1 Pow. Cont. 19.—(*n*) 1 Lond. Jurist, 340.—(*o*) Turner *v.* Meyers, 1 Hagg. Con. Rep. 414.—(*p*) Webster *v.* Woodward, 3 Day, 90; Rice *v.* Peet, 15 John. 503; Horner *v.* Marshall, 5 Mun. 466.

tion but that which is drawn between persons of sound mind, and those who are *non compos mentis*. All persons in the former condition of mind, not otherwise disqualified, may make a valid contract; but all contracts made by those in the latter situation are deemed utterly void.(*q*) And yet, according to this maxim, no man can be allowed to stultify himself; that is, to shew that he had not merely a weak mind, but that he was absolutely *non compos mentis*. If a man be of ever so feeble a capacity, short of lunacy, he may be allowed to prove that fact; or, in other words, *partially* to stultify himself in connexion with other circumstances, in order to shew that he had been defrauded. But if he be absolutely *non compos mentis*, he shall not be permitted to prove that fact, or to stultify himself *altogether;* although it would seem to be difficult to understand how the obtaining from a lunatic a conveyance of his property, can be otherwise considered, than as being in itself the strongest and most conclusive evidence of fraud. Hence, as it would seem, if the injured party should state, that being of a weak mind, he was imposed upon and defrauded; the defendant has only to prove an aggravation of his own iniquity, by shewing that the plaintiff was, in truth, at the time, not merely weak, but actually *non compos mentis*, and he may be at once silenced by this maxim.

It is said, that a man should not be permitted to stultify himself, "because, when he recovers his memory, he cannot know what he did when he was *non compos mentis*." But this cause of the rule, as thus expressed, conveys a contradiction in terms, a solecism in itself. A man in madness is not himself; his mind is aliened and gone; the rational power has left its tabernacle, and is from home. It would be just as reasonable to say, that he who is absent from his dwelling, should not obtain redress for any injury done to it during his absence, because when he returned home he could not know what had been done there while he was abroad; as that a person should not obtain redress by stultifying himself, because he could not know what he had done during the time he was insane. It has been well said, that he who jests upon a man who is drunk, injures the *absent*. But an innocent and unfortunate person is much more really and totally *absent* from himself in his madness, than a man in his drunkenness.(*r*)

(*q*) 1 Fonb. 66.

(*r*) Dr. Rush, in his observations on the diseases of the mind, has frequent recurrence to the poets for illustrations of the nature of madness; because, as he says, they view the human mind in all its operations, whether natural or morbid, with a

It is the special duty of the State to take care of those who suffer under any natural infirmity which incapacitates them from taking care of themselves. And, therefore, to adopt a maxim which in its operation casts them out from the protection of the law, of which they stand so much in need, and leaves them to be stripped of their property by the most palpable fraud, appears to be exceedingly unjust and cruel. The reason of this maxim does, in effect, declare, that the unfortunate are to be left unprotected, because they are unfortunate; that no care is to be taken of an innocent lunatic, because, being a lunatic, he knows not what he does, and cannot take care of himself. While on the other hand, it virtually proclaims, that iniquity shall be protected, and that the defrauder shall be allowed to profit by his own wrong, and to enjoy his plunder in perfect security.

It is said, that "if the common law had given a writ of *non compos mentis* to him who has recovered his memory after alienation, certainly the law would have given him remedy for the maintenance of himself, his wife, children and family, although he recovered not his memory but continued *non compos mentis*."(*s*) I do not clearly see the force of this inference; but it would seem, from what is said, that because a man cannot have a deed set aside

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microscopic eye; and hence many things arrest their attention, which escape the notice of physicians.—(*Rush on the Mind*, 153.) Shakspeare has been frequently referred to by writers on the subject of mental disorder.—(*Conolly Ind. Inst.* 319; *Coop. Med. Jur.* 291; 1 *Paris* and *Fonb.* 316, *note*.) Justinian quotes a passage from Homer to illustrate the nature of a donation *mortis causa*, (*lib.* 2, *tit.* 7, *s.* 1,) and Lord Coke allows, that to cite verses standeth well with the gravitie of our lawyers. (*Co. Litt.* 237.) I shall therefore feel myself justified in placing among the references some extracts from the poets, by way of illustration and in support of what I have said, in the text:

> ——————"Poor Ophelia,
> *Divided* from herself and her fair judgment,
> Without the which, we are pictures, or mere beasts." *Hamlet*, act 4, s. 5.
>
> "If Hamlet from himself be ta'en away,
> And, when he's not himself, does wrong Laertes,
> Then Hamlet does it not, Hamlet denies it.
> Who does it then? His madness." *Hamlet*, act 5, s. 2.

By the statute of 33 *Hen.* 8, *c.* 20, a person who had, while sane, committed high treason, and after became mad, might be tried in his *absence*, without making his personal *appearance*, &c. From which it may be inferred, that by a legal appearance at the trial, in criminal cases, is meant the actual presence of the *mind* as well as the *body*; thus recognising the position, that in a state of insanity the mind has left the body, and cannot be brought before the court with it.—4 *Blac. Com.* 25.

(*s*) Beverley's Case, 4 Co. 124.

in order to recover his property, he is therefore utterly without remedy for the maintenance of himself and family during the continuance of his insanity.

This however is not altogether correct. A right of property necessarily implies, that its owner has a remedy for the recovery of it; and also, that he is invested with the means of protection in the enjoyment of such property as the law allows him to dispose of without any other limit than that in doing so he shall not injure his fellow citizen. But if the owner has a wife and children he is bound to maintain them, at least so far as his property affords him the means. This maxim applies only to the *contracts* of the lunatic; it does not prevent him from vindicating his right to his property by an action of ejectment, trespass, trover, &c.(*t*) nor does it release him from any obligation, which his property will enable him to discharge. Now it is in execution of this his own right, and in fulfilment of this his duty to his family, that the Court of Chancery has always acted, in taking care of persons who are *non compos mentis*, and their estates. For the court is bound, in behalf of the State, to keep the lunatic, his wife, children and household with the profits of his lands and estate, and to apply the whole to their use; although he recovers not his memory, but continues *non compos mentis*.(*u*)

But we are told, that although the lunatic himself may be fettered by this maxim, yet there is a mode in which he may obtain redress; and that his heirs and personal representatives are not bound by this maxim. A commission of lunacy may be taken out, he may be declared a lunatic, and a committee appointed to take charge of his person and estate; and such committee may sue and have any deed, made by the lunatic, during his insanity, vacated for his benefit. But why this circuity? The issue joined between the committee of the lunatic and his grantee must be exactly the same, and it must be met by precisely the same proof as if the lunatic himself had been the party. But even this circuitous mode of redress, is often lame, tardy, or wholly inefficient. It is, however, better than none at all.

But if a lunatic, in the condition of having been defrauded of his property, should recover his reason, then there is an end even of this circuitous remedy. He is discharged from the government and protection of his committee, and left to regain his property as

(*t*) 3 Bac. Abr. 541.—(*u*) Beverley's Case, 4 Co. 127.

he can; taking care, however, that he does not allege his own former insanity as a ground for vacating any contract by which he may have been defrauded of it. Hence as regards his property, the recovery of his reason, instead of being a blessing, may be his greatest misfortune; for he may, notwithstanding he is in fact the owner of a large estate, be by the operation of this maxim, fixed in penury during the remainder of his days. The granting of a commission of lunacy it is said, is a matter not of right but of sound discretion under all circumstances.(*v*) But if this maxim prevails it should be held to be a matter of right, since it may be often indispensably necessary as the only means by which a lunatic can obtain justice.

The heirs and personal representatives of the lunatic are, however, not restrained by this maxim. They may obtain the redress which has been denied to *him*. The heir may recover the imperishable realty; but of whom is reimbursement to be obtained for the years of waste and devastation that may have been committed upon it during the life of the lunatic? The only remedy against the wrongdoer, in its best form, is a mere personal claim for an account of the rents and profits; but he may be a beggar. The administrator of the lunatic may reclaim his personal property itself, if to be found; or if not, he may sue for its value, if the wrongdoer can be found; and recover from him its full value, if he should be worth as much. He who delays to pay what is due, pays less than is due; but suspended and indefinitely deferred justice is a tantalizing pernicious mockery. It appears to be most extraordinary, that any code of laws should recognise a case in which the existence of a wrong is admitted, and the redress for it is postponed until after the death of the injured individual.(*w*)

There is, however, one highly respectable English lawyer who has attempted to vindicate this maxim. "Insanity," says he, "being a quality annexed to the mind of the party who is subject to it, is a conclusion upon his state of mind to be drawn only from his own actions. A person therefore may assume this disability, whereas he cannot feign infancy and duress, the proof not originating in himself and his actions, but subsisting independently. That being the case, the law (which is anxious to provide against the possibility of committing fraud, at the same time that it provides for the protection of rights,) removes the temptation to prac-

(*v*) 1 Coll. Idiots, 67; Rebecca Owings' Case, ante, 290.—(*w*) Shelf. Lun. 53.

tise the former, by prohibiting every man from setting aside his own deliberate acts by stultifying himself, although it furnishes a means by which his heirs, after his death, or his friends, whilst he is living, may avail themselves of this disability. And it is to be observed, that the law in these cases does not proceed upon the ground, that the party is bound; for that cannot be, seeing that, by the law of nature, he wants the capacity to assent to a contract; but because the policy of the law, which rather submits to particular mischief than a public inconvenience, sets bounds to the law of nature in point of form and circumstance."(*x*)

The argument, here derived from considerations of public policy, results in this; that a greater amount of fraud and injustice would be likely to ensue by allowing men to stultify themselves, in order to avoid their contracts, than by refusing them permission to do so for that purpose. And this position is founded on an assumption of the fact, that it is exceedingly easy to counterfeit madness without being detected; or that of those who do deceitfully pretend to be insane the far greater number escape detection; and consequently, but for this maxim the appearance of lunacy would be very frequently put on, for the purpose of practising imposition and fraud. The position however, is not sustained by the fact. It is incumbent upon those who advance this argument to shew, that instances of feigned madness are common; and also that in those instances the detection of the deceit has been rare or difficult. In criminal cases, to defeat the progress of justice, and under various circumstances to escape from oppression or some imminent peril, the artifice of counterfeiting madness has often been resorted to; but no instances of fraud in civil cases, perpetrated by means of pretended lunacy, have been adduced, and I know of none.(*y*)

(*x*) 1 Pow. Cont. 20.

(*y*) The following observations of Messrs. Paris and Fonblanque, in their excellent work on Medical Jurisprudence, are well worthy of attention: "There are (say they) several objects, for the accomplishment of which persons are induced to simulate the existence of disease—such as, for obtaining military exemptions and discharges; or certain civil disqualifications; for the purpose of deriving parochial relief, or pecuniary assistance from benefit societies; or the comfortable shelter and retreat of an hospital; for exciting compassion and obtaining alms; for creating public interest and curiosity; for procuring a release from confinement or exemption from punishment; and, lastly, for the dishonest intention of recovering unjust compensation from some person selected for accusation, as the author of the pretended calamity."

"The diseases which have been selected for the accomplishment of any of the purposes above enumerated are extremely numerous, although there are some few which may be said to be more generally preferred on such occasions. In general,

The doubtful and uncertain point at which reason disappears, and where incapacity becomes evident and manifest, can only be fixed by the particular circumstances of each particular case. And it must be admitted to be difficult to lay down, with any thing like positive precision, any rules by which the sanity of the mind can be tried. Insanity is, however, a fact; and like every other fact, upon which the rights of persons or of property may depend, must be established by proof clear, strong, and demonstrative.(*z*) In cases of this sort, the evidence of medical men is, in general, produced; and, in proportion to the great improvements in that branch of science, such evidence is now more than ever to be relied upon.(*a*) I therefore deem it a sufficient answer to this argument, derived from considerations of public policy, to deny the truth of the fact upon which it is based; and to rely upon the circumstance, that if there ever had been any such foundation for it, we should not, at this day, be at a loss to find any clear evidence of those facts in any foreign code, or in the innumer-

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the medical inquirer will not have much difficulty in detecting such impostors; although there are cases where the investigation becomes a subject of extreme delicacy and importance, as in those persons reporting themselves sick and unfit for military service, or *malingerers*, as they are technically called."

"Insanity has in all ages been feigned for the accomplishment of particular objects; we read of its having been thus simulated by David, Ulysses, and Lucius Brutus. In general, the detection of such an imposition will not be difficult; the feigned maniac never willingly looks his examiner in the face, and if his eyes can be fixed, the change in his countenance, on being accused, will be strongly indicative of his real state of mind. It is, moreover, very difficult to imitate the habits of a lunatic for any length of time, and to forego sleep. An insane person generally sleeps but little, and talks much during the night; but the pretender, if he thinks he is not watched, will sleep, and only act his part when he believes his conduct to be observed."—1 *Par.* & *Fonb.* 335,359; 3 *ibid.* 137; 1 *Hale, P. C.* 33, 35; 1 *Hawk. P. C.* 2; 3 *Inst.* 6; 4 *Co.* 124; *Coop. Med. Jur.* 266, 322; *Rush on the Mind*, 18, 216; 1 *Sam.* 21, *v.* 13; *Con. Insa.* 455; *Shelf. Lun.* 69.

It appears from the circumstances related by Messrs. Paris and Fonblanque, that during the wars arising out of the French Revolution, the French and English surgeons became exceedingly skilful in detecting recruits in their attempts to escape from service in the army or navy by feigned diseases. But in all ages, under arbitrary or corrupt governments, it has been common to endeavour to defeat oppression by fraud; and where that has failed, or could not be successfully practised, there have been frequent instances, in which the individual has voluntarily maimed and disabled himself from being made an instrument in the hands of his oppressor.—*Gibbon, D. & F. chap.* 17; *Co. Litt.* 127; 2 *Diver. Pur.* 21. But no instance is mentioned by Messrs. Paris and Fonblanque, nor have I any where met with any allusion to a case where a party *feigned insanity* as a means of evading *the obligation of his contract.*

(*z*) Attorney General *v.* Parnther, 3 Bro. C. C. 441.—(*a*) Sherwood *v.* Sanderson, 19 Ves. 286; 1 Pari. & Fonb. 315; Shelf. Lun. 70.

able English reported adjudications in relation to the subject of insanity.

It is admitted, that many of the wise and sound maxims of the law are founded on considerations of public policy. But it by no means follows, that they are each of them similar and in principle alike; or that they do, in any respect, sustain each other by analogy. Upon considerations of public policy, the law will not permit the verity of certain public acts and judicial records to be called in question; but the foundation of that rule, it is evident, is very different;—indeed it is admitted to be directly contrary from that of this maxim, in relation to contracts.(*b*)

Upon the whole, I am clearly of opinion, that this English rule, which declares, that a man shall not stultify himself by his own plea, never has been, and ought not to be considered as a part of the law of Maryland. And having thus disposed of this preliminary point, upon the determination of which the nature of the further investigation of this case so essentially depended, I feel myself now at liberty to take every view of it which the pleadings and proofs will warrant; and to dispose of it upon the established rules of equity, and the broad principles of natural justice; and shall proceed accordingly.

Before I go into an examination of the proofs, it seems to be proper that something should be said respecting the general nature of insanity, or that unsound condition of the human mind, to which so large a portion of the testimony relates; and, upon a just conception of which infirmity, a correct determination of this case so mainly depends. "Madness," says Sir *William Scott*, "is a state of mind not easily reducible to correct definition, since it is the disorder of that faculty with which we are little acquainted; for all the study of mankind has made but a very moderate progress in investigating the texture of the mind, even in a sound state. In disease, where it has pleased the Almighty to envelope the subject matter in the darkness of disease, it will probably always continue so; but the effects of this disordered state are pretty well known. We learn from experience and observation all that we can know, and we see that madness may subsist in various degrees, sometimes slight, as partaking rather of disposition or humour, which will not incapacitate a man from managing his own affairs, or making a valid contract. It must be something more than this;

(*b*) 1 Pow. Cont. 22.

something which, if there be any test, is held by the common judgment of mankind, to affect his general fitness to be trusted with the management of himself and his own concerns. The degree of proof must be still stronger, when a person brings a suit on allegation of his own incapacity, by exposing to view the changes of his mind."(*c*) And an eminent physician, in "An Inquiry concerning the Indications of Insanity," observes, that "the same intellectual light *may* be given to all; but in some obscured by a gross organization, and in others, more happily organized, shining forth more brightly. Itself out of the reach of physical injury, it works by physical instruments; and the exactness of its operations depends on the growth, maturity, integrity, and vigour of its instruments, which are the brain and nervous system. If the nervous agents of sensation are unfaithful, the mind receives false intelligence, or transmits its orders by imbecile messengers: if the seat of thought, the centre of intellectual and moral government, is faultily arranged; the operations of the understanding are impeded and incomplete. Nay, so dependent is the immaterial soul upon the material organs, both for what it receives and what it transmits, that a slight disorder in the circulation of the blood through different portions of nervous substance, can disturb all sensation, all emotion, all relation with the external and the living world; can obstruct attention and comparison, can injure and confound the accumulations in the memory, or modify the suggestions of imagination."(*d*)

The plaintiff has been subject to attacks from a disorder, that has repeatedly darkened her understanding with delirium; the proofs exhibit some of her conduct as indicative of lunacy; and that dotage, or intellectual weakness, which the bill represents to be her present condition, is a species of insanity which does not appear to have been very attentively considered, either by the profession of medicine or of the law. Its approaches are most commonly so gradual as to be for some time imperceptible, and the early evidences of it are almost always exceedingly equivocal. Under the generic legal term, *non compos mentis*, is comprehended every species of mental derangement which incapacitates a man from assenting to, or making a legal contract. But, for the purpose of obtaining as clear a view as may be of a subject so obscure, and without placing too much reliance upon any general definitions,

(*c*) Turner *v.* Meyers, 1 Hagg. Cons. Rep. 414.—(*d*) Conolly Ind. Ins. 62.

I shall follow what appear to be the substantial distinctions marked by external indications, and recognised by our law as manifested in idiocy, delirium, lunacy, and dotage.(*e*)

Idiocy is that condition in which the human creature has never had, from birth, any the least glimmering of reason; and is utterly destitute of all those intellectual faculties by which man, in general, is so eminently and peculiarly distinguished. It is not the condition of a deranged mind; but that of a total absence of all mind. Hence this state of fatuity can rarely or ever be mistaken by any, the most superficial, observer. The medical profession seem to regard it as a natural defect, not as a disease in itself, or as the result of any disorder. In law, it is also considered as a defect, and as a permanent and hopeless incapacity.(*f*)

Delirium is that state of the mind in which it acts without being directed by the power of volition, which is wholly or partially suspended. This happens most perfectly in dreams. But what is commonly called delirium, is always preceded or attended by a feverish and highly diseased state of the body. The patient in delirium is wholly unconscious of surrounding objects; or conceives them to be different from what they really are. His thoughts seem to drift about; wildering and tossing amidst distracted dreams. And his observations, when he makes any, as often happens, are wild and incoherent; or, from excess of pain, he sinks into a low muttering, or silent and death-like stupor.(*g*) The law contemplates this species of mental derangement as an intellectual eclipse; as a darkness occasioned by a cloud of disease passing over the mind; and which must soon terminate in health or in death.(*h*)

Lunacy is that condition or *habit* in which the mind is directed by the will, but is wholly or partially misguided, or erroneously governed by it; or it is the impairment of any one or more of the faculties of the mind, accompanied with, or inducing a defect in the comparing faculty. For, as has been observed by a great philosopher, those who either perceive but dully, or retain the ideas that come into their minds but ill, who cannot readily excite or compound them, will have little matter to think on. Those who cannot distinguish, compare, and abstract, would hardly be able to

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(*e*) 1 Par. & Fonb. 307; Rush on the Mind, 234; Shelf. Lun. intro. s. 2.—(*f*) 1 Par. & Fonb. 289, 308; Rush on the Mind, 292; Co. Litt. 246; 1 Hawk. P. C. 2, note; Donegal's case, 2 Ves. 408.—(*g*) 2 Zoonomia, C. 2, 1, 7; Rees' Cyclo. ver. Delirium; Rush on the Mind, 9, 298; 1 Par. & Fonb. 300.—(*h*) 1 Coll. Idiots, 7, 405; 1 Fonb. 68; Shelf. Lun. 43; Brogden v. Brown, 2 Add. Eccl. Rep. 441.

understand and make use of language; or judge or reason to any tolerable degree; but only a little and imperfectly about things present and very familiar to their senses. The defect in idiots seems to proceed from want of quickness, activity, and motion in the intellectual faculties, whereby they are deprived of reason; whereas madmen seem to suffer by the other extreme: for they do not appear to have lost the faculty of reasoning, but having joined together some ideas very wrongly, they mistake them for truths, and they err as men do who argue right from wrong principles. For, by the violence of their imaginations, having taken their fancies for realities, they make right deductions from them. In short, madmen put wrong ideas together, and so make wrong propositions, but argue and reason right from them; but idiots make very few or no propositions, and reason scarce at all. The erroneous perception of some of the mental faculties, uncontrolled by its comparing faculty, often becomes exceedingly extravagant, and extends to the whole conduct of the individual. In such cases, lunacy is so strongly marked as to be obvious at first sight, or upon a single interview with the unhappy sufferer. The most strange, whimsical, and incongruous associations are made of thoughts and objects; matter and impertinency are mixed; and the mind is involved in the most obstinate and unaccountable mistakes. During these hallucinations, however, the perceptions seem to be, in many respects quickened, and the maniac becomes exceedingly suspicious, watchful, cunning, and adroit.(*i*)

(*i*) 1 Zoonomia, sec. 34, 2, 1; 2 ibid. Cla. 3, 1, 2; Rees' Cyclo. ver. Mental Derangement; Locke Hum. Und. b. 2, c. 11, s. 12 & 13; Con. Ind. Insanity, 114, 300; 1 Coll. Id. 8, 36; 1 Par. & Fonb. 302, 311, 318; Rush Mind, 72, 133, 14, 257; Shelf. Lun. cha. 3.

> "Oh matter and impertinency mixt!
> Reason in madness!" *Lear*, act 4, s. 6.

> "My pulse, as yours, doth temperately keep time,
> And makes as healthful music: It is not madness,
> That I have utter'd: bring me to the test,
> And I the matter will reword; which madness
> Would gambol from." *Hamlet*, act 3, s. 4.

Sir Henry Halford, a celebrated English physician, relates an instance in which this *test*, appealed to by Hamlet, was applied to a patient of his, who desired to make his will. The sick man was requested to give directions how his will should be made, and it was accordingly drawn, read to, and signed by him; but being suspected to be of unsound mind, after a short interval, he was requested to repeat the directions he had given, "to reword the matter," but in endeavouring to do so, his mind gambolled from it, and wandered so materially from his first directions, that he was

It very commonly happens, however, that the derangement of the mental faculties is confined to some particular idea or object of desire or aversion. The idea or object thus erroneously contemplated, is usually and not inaptly called the *mad point;* and hence this species of insanity has been denominated *monomania.*(*j*) In cases of this kind, which may be adduced as a ground for relief or defence in any judicial controversy, it should appear that the morbid image in the mind of the patient has been connected by him with, and has perverted his judgment in relation to those of his acts which are drawn in question.(*k*) And as in *monomania*, there are whole classes of subjects as to which the intellectual faculties of the patient may be entirely trustworthy; so, on the other hand, even in cases of general insanity, there may be not only lucid intervals in

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held to be *non compos mentis*, and the will was therefore set aside.—5 *Quar. Jur. Scie.* 242.

A change came o'er the spirit of my dream.
The lady of his love;—Oh! she was changed
As by the sickness of the soul; her mind
Had wander'd from its dwelling, and her eyes
They had not their own lustre, but the look
Which is not of the earth; she was become
The queen of a fantastic realm; her thoughts
Were combinations of disjointed things;
And forms impalpable and unperceived
Of others' sight, familiar were to hers.
And this the world calls phrenzy; but the wise
Have a far deeper madness, and the glance
Of melancholy is a fearful gift;
What is it but the telescope of truth?
Which strips the distance of its phantasies,
And brings life near in utter nakedness,
Making the cold reality too real! *Byron's Dream.*

(*j*) Such phantoms pride, in solitary scenes,
Or fear, or delicate self-love, creates.
From other cares absolv'd, the busy mind
Finds in yourself a theme to pore upon;
It finds you miserable, or makes you so.
For while yourself you anxiously explore,
Timorous self-love, with sick'ning fancy's aid,
Presents the danger that you dread the most,
And ever galls you in your tender part.
Hence, some for love, and some for jealousy,
For grim religion some, and some for pride,
Have lost their reason; some for fear of want,
Want all their lives; and others every day,
For fear of dying, suffer worse than death.

Dr. Armstrong on Health, book 4.

(*k*) White *v.* Wilson, 13 Ves. 88; Bootle *v.* Blundell, 19 Ves. 508; Dew *v.* Clark, 1 Addams' Eccl. Rep. 279, and 3 Addams' Eccl. Rep. 79; Shelf. Lun. intro. 54 & 293; Conolly Ind. Insanity, 383, 446.

all respects, but there may also be particular points and objects as to which the mind of the maniac may be perfectly clear, consistent, and sound; as in the case of the holographic will made by a lunatic woman, whose hands, at her earnest entreaty, were untied for the purpose of permitting her to write.(*l*)

But this proteus disorder, in its milder forms, is not at all perceptible to a superficial observer, often escapes the notice of the most skilful, even after being apprised of the existence of the malady; and it frequently happens that it cannot be detected without an examination of some time, and repeated observations. Although in law this state of the mind is held to be a course or *habit*, not a mere act, but as having some continuance; yet it is considered as a distempered condition, occasioned by disorder or accident, from which the recovery of the patient is deemed possible and probable; and therefore he and his property are always disposed of with a view to a recovery.(*m*)

Dotage is that feebleness of the mental faculties which proceeds from old age. It is a diminution or decay of that intellectual power which was once possessed. It is the slow approach of death; of that irrevocable cessation, without hurt or disease, of all the functions which once belonged to the living animal. The external functions gradually cease; the senses waste away by degrees; and the mind is imperceptibly visited by decay. The inert and dull senses transmit the passing occurrences so imperfectly to the sensorium, that they leave none, or but a very transitory impression there. Hence long past transactions are often remembered with much more exactness than those which have taken place recently. In the *second* childhood, as in the *first*, all the *present* makes but a faint and fleeting impression upon the mind. Hence the judgment in both stages, is weak, and the conduct unsteady and frivolous.(*n*)

(*l*) Cartwright *v.* Cartwright, 1 Phill. 90.—(*m*) 1 Coll. Id. 33; Beverley's case, 4 Co. 124; Donegal's case, 2 Ves. 408; Attorney General *v.* Parnther, 3 Bro. Ch. Ca. 441; Fitzgerald, a lunatic, 2 Scho. & Lefr. 437; Shelf. Lun. 36.

(*n*) "The soul in all hath one intelligence;
Though too much moisture in an infant's brain,
And too much dryness in an old man's sense,
Cannot the prints of outward things retain:
Then doth the soul want work, and idle sit;
And this we childishness and dotage call. *Davies.*

Or, as has been said, it is that decline of all the powers of the man, when
Nature, as it grows again towards earth
Is fashion'd for the journey, dull, and heavy. *Cowper.*

Shakspeare's *As You Like It*, act 2, s. 7, and second part of *Henry 4th*, act 1, s. 2.

But a man in his dotage is evidently distinguishable from an idiot, who has no mind at all; a patient in delirium, whose mind is ungoverned and ungovernable; or a lunatic, whose mind is in ruins, broken up, and the component parts of which are at variance with each other. The old man has a mind, worn and in a state of decay, it is true, but still, so much of it as remains, is feebly governed upon the principles of its former sound condition; its conceptions are not impertinently mixed; nor is it grossly misguided in any of the feeble operations of which it is capable. Perhaps the most striking peculiarity of dotage is its imbecility of perception. The senses not supplying the mind as usual with matter for exertion, it decays for want of use; and becomes incapable of receiving any additional ideas, or of following through any unusually catinated, or long combination of thought. Hence the infant and the dotard, from imbecility of bodily functions, present that remarkable similarity in the feebleness of their minds; and easily surrender themselves to the direction of those about them, for whom they have a regard, or who may choose to exercise any authority, or influence over them. Physicians, it appears, do not regard this species of mental imbecility as being in itself a disorder, or the effect of disease.(*o*) But the law considers it not only as a species of insanity, from which there is no hope of recovery, but as one which always becomes worse as age advances.(*p*)

It has been long and well established, that a contract made by a person who is, at the time, actually *non compos mentis*, either as in idiocy, delirium, lunacy, or dotage, is entirely void; indeed it would seem to be difficult to conceive how such a contract should ever have been otherwise considered than as an absolute nullity.(*q*) But the law does not allow of an examination into the wisdom and prudence of men in disposing of their estates; for every man who is legally *compos mentis*, is a disposer of his property, and his will stands for a reason. The law however so far regards human infirmity, as that if a person of *weak mind* be imposed upon, he may be relieved; not, however, merely because of his weakness of mind, or of his old age; for, that alone furnishes no sufficient ground for vacating a

(*o*) Rees' Cyclo. ver. Death; 1 Par. & Fonb. 308; Rush on the Mind, 61, 292, 294; Conolly Ind. Insanity, ch. 8 & page 440, 443.—(*p*) Leving *v.* Caverly, Prec. Chan. 229; Ridgeway *v.* Darwin, 8 Ves. 66; *Ex parte* Cranmer, 12 Ves. 446; Gibson *v.* Jeyes, 6 Ves. 275.—(*q*) Thompson *v.* Leach, 1 Ld. Raymond, 313; 3 Mod. 301.

contract; yet, that with other circumstances, will afford a sufficient foundation for relief.(*r*)

What is that degree of intellectual imbecility which may be taken into the estimate as one of the component parts of a ground for relief, in those cases where the boundary between mere weakness and a condition of *non compos mentis* is so narrow that it may be difficult to draw the line,(*s*) I shall not undertake to determine, as I have not been able to find it any where particularly described.(*t*) It must not, however, be confounded with mere ignorance. If the grantor be an ignorant and illiterate man, one who cannot read; it is necessary, that the deed should be fully and correctly read to him; for, if it is not read at all, or improperly read to him, or if it be read or explained to him improperly even by a stranger,(*u*) he will not be bound by it; not on the ground of weakness of mind, or of his incapacity clearly to judge of what he was about; but because his sound mind cannot be presumed to have assented to that of which it was wholly ignorant or misinformed.(*v*)

It has been laid down in general terms, that it is fraudulent to obtain a deed by the exercise of undue influence over a man whose mind had ceased to be a safe guide of his actions;(*x*) or from a man who was of small understanding and not able to govern the lands which had descended to him.(*y*) A woman who could read and write, and had taught a child to read, was held to be a person of weak understanding;(*z*) so repeating scraps of Latin and reading classic authors was deemed no proof of sanity; because what a person learns in his youth leaves a lasting impression, and the traces of it are never entirely worn out. Such a person, though not a lunatic, was determined to be a weak man.(*a*) In another case it is said, that the man was foolish to imbecility, though not to downright idiocy.(*b*) A man who had entirely recovered from a long continuance of lunacy is said to have been of a diseased intellect from his birth.(*c*) A young man is said to have been of mean parts and easy to be imposed upon.(*d*) A person is spoken

(*r*) Osmond *v.* Fitzroy, 3 P. Will. 130; Willis *v.* Jernegan, 2 Atk. 251; Chesterfield *v.* Janssen, 2 Ves. 156; Lewis *v.* Pead, 1 Ves. jun. 19; 1 Fonb. 66. (*s*) Bennet *v.* Vade, 2 Atk. 325.—(*t*) Ball *v.* Mannin, Shelf. Lun. 258.—(*u*) Thoroughgood's Case, 2 Co. 9.—(*v*) Henry Pigot's Case, 11 Co. 27; Hatch *v.* Hatch, 9 Ves. 295.—(*x*) Harding *v.* Handy, 11 Wheat. 125; Chesterfield *v.* Janssen, 2 Ves. 156.—(*y*) Twyne's Case, 3 Co. 83.—(*z*) White *v.* Small, 2 Chan. Ca. 103.—(*a*) Bennet *v.* Vade, 2 Atk. 325.—(*b*) Bunch *v.* Hurst, 3 Desau. 292.—(*c*) Wright *v.* Proud, 13 Ves. 138.—(*d*) Portengton *v.* Eglington, 2 Vern. 189.

of as being seventy-two years of age and a weak man easily to be imposed upon.(*e*) And again it is said that the grantor was upwards of eighty-four years of age; blind or nearly so, and altogether dependent on the kindness and assistance of others.(*f*) From all which it would appear, that by weakness is meant a sort of mental imbecility approaching to the condition of one who is actually *non compos mentis*, and analogous to childishness and dotage.(*g*)

The circumstances which, when taken in connexion with this weakness of mind, constitutes a foundation of fraud whereon to vacate a contract, are various.(*h*) Such as that of the deed never having been left for perusal; or its not being read; or its being prepared by the grantee and obtruded on the grantor; or where the gift was exorbitant; or where the party had not then the means of paying what he stipulated to pay; or where in consequence of the relation in which the parties stood towards each other, or in any way, the grantee had obtained a commanding influence, or the entire confidence of the grantor, which was used; as in the case of a wife who had used unwarrantable means to insinuate herself into the favour of an old man, and by imposing upon his weakness, had clandestinely obtained from him a conveyance of his estate;(*i*) or where the consideration was greatly inadequate; or where the weak man had conveyed all his property, leaving himself to be fed and clothed at the pleasure of the grantee. In all these, and many other similar cases, the weakness of mind of the party, who was not altogether *non compos mentis*, has been taken into account with the other circumstances to make up that amount of imposition and fraud which was considered as a sufficient ground for relief.(*j*)

This plaintiff, it appears, has until the latter years of her long life enjoyed a full share of sound well regulated mental capacity. But when this suit was instituted she had advanced beyond the

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(*e*) Clarkson *v.* Hanway, 2 P. Will. 204.—(*f*) Griffith *v.* Robins, 3 Mad. 191. (*g*) Kaimes' Pri. Eq. b. 1, p. 1, c. 1, s. 3 & c. 2; Bates *v.* Graves, 2 Ves. jun. 289. (*h*) Shelf. Lun. 265.—(*i*) Hervey *v.* Hervey, 1 Atk. 564; Mountain *v.* Bennet, 1 Cox. 353; Nantes *v.* Corrock, 9 Ves. 183.—(*j*) White *v.* Small, 2 Chan. Ca. 103; Portington *v.* Eglington, 2 Vern. 189; Clarkson *v.* Hanway, 2 P. Will. 204; Donegal's Case, 2 Ves. 408; Bridgman *v.* Green, 2 Ves. 627; Bennet *v.* Vade, 2 Atk. 324; Norton *v.* Relly, 2 Eden, 286; Wright *v.* Proud, 13 Ves. 136; Huguenin *v.* Basely, 14 Ves. 273; Harvey *v.* Pecks, 1 Mun. 518; Rutherford *v.* Ruff, 4 Desau. 350; Rowland *v.* Sullivan, 4 Desau. 518; Brogden *v.* Walker, 2 H. & J. 285; Gibson *v.* Jeyes, 6 Ves. 275.

eighty-fourth year of her age; and upon a short interview which I had with her, after the commencement of this suit, it appeared that her age was attended with at least its ordinary infirmities. Some of the most skilful of the witnesses after a short visit, which they made to her, say, that they observed in her mental powers a slower comprehension and a diminished power of associating her ideas, which is common to old age. Other witnesses represent her mind as then in a state of absolute dotage; in a condition of feebleness reduced much below that degree of power necessary to a sensible disposition of her property. And the defendant admits, that the plaintiff was then so enfeebled by age and its consequent infirmities, that her mind was exposed to the exercise of very undue influence by those about her. From the very nature of this mental infirmity, it is evident, that its then existence is, in itself, proof of its having commenced some time before. The transition from soundness of mind to delirium, or lunacy, may be very rapid or instantaneous; but dotage is a slow decay, the external signs of which do not appear until after it has been going on for some time. The proofs clearly establish the fact, that the plaintiff is now in a state of dotage. But its perceivable commencement has not been so well ascertained. Two of the witnesses speak of its having been observable so much as about eight years ago. It is certain, however, that her dotage commenced some years before the institution of this suit. The proofs, in relation to the plaintiff's conduct, also exhibit some instances of the milder forms of lunacy. The plaintiff's account of a hurt she had lately sustained, ascribing it to her falling in a race she ran; the particulars she related of her visit to Annapolis; and some other circumstances, are evidences of that species of incongruous association and misguided direction of the mind so peculiarly characteristic of lunacy. Such is the sum and substance of the testimony so far as regards the general condition of the plaintiff's mind.

In relation to the epoch of the execution of the deed of the 15th of June 1824, the proceedings and the proofs are more distinct and particular. It is stated and admitted, that the plaintiff was subject to attacks of erysipelas, and was suffering under that disorder when the instrument of writing, which is the special subject of this controversy, was executed. From good medical authority we learn, that erysipelas is often preceded, or attended, or succeeded by delirium; that it is apt to affect the brain; and

that the inflammation or oppression of the brain is known either, by delirium with a quick pulse; or by stupor and slow respiration with a slow pulse. And that sometimes, when the delirium is not complete, a new face, and louder voice will stimulate the patient to attend for a few moments, and then he relapses. But glaring light, loud noises, and company increase the irritation and aggravate the delirium.(*k*)

It appears from the testimony, that the plaintiff had been attacked with the erysipelas some days before the 15th June 1824; that one of the attending physicians was informed by the family, that the disorder of the plaintiff was a periodical one, and generally came on about eight o'clock in the morning. Dr. *Marsh* says, that during the paroxysms, there was always a determination towards apoplexy. Dr. *Griffith* visited the plaintiff on the 14th of June, (he thinks in the afternoon,) she then complained a good deal of her head, but was rational. The Doctor perceived no disarray of inteliect; and he thinks she was at that time sufficiently possessed of her faculties to make a contract or dispose of her property. But after the Doctor left her, and in the evening of the same day, she was delirious; or as the witnesses say, out of her head; and her mind was entirely gone; that when roused she would speak incoherently and then sleep again; insensible to any thing that passed; that there was some company in the plaintiff's room, who were removed lest their conversation and noise should disturb or injure her.

About sunrise of the morning of the 15th of June, the defendant came into the chamber of the plaintiff, and with a great noise hoisted the windows, threw open the shutters, and let into the room a strong light; which however did not arouse the plaintiff, who had lain the whole night, and then was in a state of apparent preternatural sleep; insomuch so, that she did not notice an attendant, who, after the windows had been thus noisily opened, felt her forehead and took hold of her hand. Immediately after which the defendant was left alone in the room with the plaintiff thus abed. What passed, if any thing, while these parties were so left together in the same room, does not appear. But in a short time afterwards, *Thomas D. Cockey* and *John Fendal*, two justices of the peace, who had, the evening before, been sent for and requested, by the defendant, to attend there on that morning, were introduced into

(*k*) 2 Zoonomia, Cl. 2, 1, 3, 2; Rees' Cyclo. ver. Delirium.

the plaintiff's chamber by the defendant; they found the plaintiff quite awake, and interchanged with her the usual salutations on the meeting of acquaintances. Immediately after the coming in of these justices the defendant produced the instrument of writing referred to in the proceedings as the deed of the 15th June 1824; and offered it to the plaintiff for execution. The defendant raised the plaintiff up, and assisted in seating her in bed; and then on being accommodated by a desk placed in her lap to write upon, and having her hand steadied or guided by Justice *Fendal*, the plaintiff signed the instrument of writing and acknowledged it as her act and deed; and these justices took and certified the acknowledgment accordingly. This instrument of writing so signed by the plaintiff, which conveyed the whole of her property, was not then read to, or by her; nor does it appear, that she ever once saw it before; nor was there at that time any conversation upon the subject. No one else was then present in the room but these four persons, the two parties, and the two justices. And, after a stay of about one hour in the house, the two justices departed.(*l*)

These justices (one of whom, *Fendal*, only it appears but once ever saw the plaintiff at any other time during the illness under which she was then suffering,) both assert, that when they took her acknowledgment of the deed, she was in a sound state of mind. But other witnesses testify, that on the morning of that day she was in rather a weaker condition than on the evening before; that her mind was evidently wandering; and that she was manifestly incapable of judging of the propriety or effect of any deed or other

(*l*) I have shewn in a former case, (*H. K. Chase's case*, *ante*, 206) that a private acknowledgment of a deed of conveyance by a *feme covert* was introduced here as a substitute for a *fine*, and that such an acknowledgment was held to be as binding upon her, although not altogether as effectual against third persons, as a *fine*. A person *non compos mentis* cannot levy a fine, or make a conveyance of his property in that mode, because the judges will not receive the acknowledgment of an *insane* person; but if a judge does receive the acknowledgment of a fine from the most monstrous and visible idiot, it will be held to be final and conclusive against him; because, as a judicial record, it cannot be questioned;—(*Mansfield's Case*, 12 *Co.* 124, and 10 *Co.* 42;) yet a fine is said to be nothing more than a common conveyance. This pernicious incongruity between a conveyance by deed, and by *fine* in England, it is said, is about to be removed by a statute abolishing *fines* and recoveries, and substituting deeds of conveyance, which are to have the same effect without being considered as conclusive judicial records.—(*Shelf. Lun. & Idiots*, 248, *note*.) But in Maryland, the acknowledgment of a deed before justices of the peace, although in some particulars treated as the substitute of a *fine*, has never been considered, like a fine, as a judicial record, and to that extent conclusively binding upon the party.—(*Lewis' Lessee v. Waters*, 3 *H. & McH.* 430.)

matter which required consideration; and that she had been in that condition some two or three days previous. About four o'clock in the afternoon of the 15th, Dr. *Marsh* visited the plaintiff and found her apparently asleep, but on being once or twice called by the defendant, the plaintiff roused up, and gave him her hand. The Doctor thinks she answered intelligently to all the questions he asked her. But he declined to answer directly, and say, whether or not she was then in a sound state of mind; and says, that the questions he asked her were not of a nature for him to judge of her sanity. On the next morning, the 16th, Dr. *Marsh* and Dr. *Griffith* at nine o'clock, visited the plaintiff, and found her in an apoplectic state, entirely insensible and unable to speak or move; and requiring all the strength of one of them to straighten her arm to bleed her.(*m*) After being bled she continued to be perfectly comotose, or absorbed in a preternatural sleep, or stupor, until daybreak of the 17th, when she awoke; but was still incoherent in her mind. After which she gradually recovered.

The instrument of writing, which was thus signed on the 15th of June 1824, had been prepared by Justice *Fendal*, as he states, for and at the request of the defendant about six months previous; but the defendant admits, in her answer, that she had caused it to be prepared by him in 1822. During the greater part of the interval between the periods of its preparation and execution, the plaintiff had enjoyed her usual state of good health. About six months before this instrument was executed, in a conversation upon the subject of the provision which the plaintiff had promised, or intended to make for the defendant, the plaintiff declared to the defendant, that she would leave her no more than a life estate in her property. And the plaintiff often before and after made similar declarations. The defendant had always continued to reside with the plaintiff, who had latterly confided the management of her estate very much or altogether to the defendant, who had always conducted herself toward the plaintiff as a dutiful daughter; and the plaintiff had great confidence in the defendant.

Upon the whole then, and after the most careful investigation of this case, thus far, there appears to be no one ground upon which this deed can be permitted to stand. It was prepared at the sole instance of the defendant. It was never at any time submitted to

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(*m*) "A very apoplexy, lethargy, mulled, deaf, sleepy, insensible."—*Coriolanus*, act 4, s. 5.

the consideration of the plaintiff, or in her possession for an instant before its execution; and at that time, it was neither read by or to her, or explained to her in any form whatever.(*n*) It conveys to the defendant, in the most full and comprehensive terms, the whole and entire estate real and personal of the plaintiff, without condition or reservation of any kind whatever. It professes to have been made for value received, but was in fact signed without the least valuable consideration; and, if sustained, would leave the plaintiff utterly destitute and pennyless. At the time of the execution of this deed the plaintiff was upwards of eighty-four years of age; and was then, and had been for some time previous in a state of general dotage: and besides, was at the time suffering under an attack of erysipelas, that grievously affected her mental faculties, from which attack she could not have immediately recovered a perfectly sound state of mind, even after that bodily disease had intermitted or passed off, and which disorder must have considerably accelerated the previously commenced devastations of age.(*o*) This deed must therefore be annulled, as well because the plaintiff was, at the time it was executed, actually *non compos mentis;* as on the ground, that it was obtained by the most gross abuse of confidence, and by a fraudulent combination; for, as it has been truly said, fraud and deceit by him who is trusted, is most odious in law.(*p*)

Thus far the plaintiff will obtain all the equity she asks. But he who asks equity must do equity. The plaintiff herself seems to admit in her bill, when taken in connexion with her late husband's will, which she exhibits as a part of it, that she stands here in some sort encumbered with an equity due to the defendant. And the only difference between these parties as to that claim is as to its extent. The defendant claims an absolute estate in fee simple in the property of the plaintiff after her death. While, on the other hand, the plaintiff insists, that the defendant's claim extends no further than a life estate with remainder to her lawful children, should she have any.

The bill states, that the plaintiff was seized in fee simple of a tract of land called "*John & Thomas' Forest;*" that at an early period of her life she married *John C. Owings*, who made his will,

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(*n*) Thoroughgood's Case, 2 Co. 9.—(*o*) Attorney General *v.* Parnther, 3 Bro. C. C. 443; 1 London Jurist, 340; Sergeson *v.* Sealey, 2 Atk. 413.—(*p*) Fermor's Case, 3 Co. 79.

which is exhibited as a part of the bill, and died in February 1810; that the plaintiff had intended, by her last will, to make some sufficient provision for the defendant, the nature of which is thus described. After some specific legacies to the plaintiff's children and grand-children, to give the defendant an estate for life in her real property, the residue of her personal estate, and a remainder in the real estate to the defendant's children should she have any; and in the event of failure of issue lawfully begotten, then to the other children of the plaintiff to be equally divided among them. That the defendant being wholly dissatisfied with such a provision, and insisting on an unconditional absolute estate in the whole, the plaintiff then openly avowed her determination to make no will; to die intestate, and to leave her property to pass and be distributed according to law. The defendant admits these facts; but alleges and insists, that four of her sisters having been amply provided for by the late *Thomas C. Deye* their uncle, the plaintiff promised the late *John C. Owings* the defendant's father, that she would give her estate to the defendant. In consequence of which, and in confident reliance upon that promise, her father made his will, in the manner he did, leaving the defendant nothing more than a mere token of his affectionate recollection. And the defendant avers, that the deed of the 15th of June 1824 was made with a view to and in fulfilment of that promise.

From the proofs it appears, that *John C. Owings* and the plaintiff his wife during their marriage had eight children, who survived him; and that he had a large estate consisting of real and personal property within this State and elsewhere; that his uncle the late *Thomas C. Deye*, was seized of a considerable real estate, which by his last will he devised to four of the daughters of his nephew *John C. Owings*, each of whose share contained from four hundred and fifty to six hundred acres of land, the least of which was estimated as worth about $16,000; that *John C. Owings*, the late husband of the plaintiff, by his will, and otherwise, gave the whole of his real and personal estate to his two sons *Thomas D. Owings* and *John C. Owings;* except some personalty, which he gave to his wife, and some other property, which he gave to his daughters in payment of a debt he owed them. The property he gave to his son *Thomas* is said to have sold for $20,000.

In his will the late *John C. Owings*, the father of the defendant, says—"I give to my daughter *Charlotte Deye Owings* a family Bible and a spinning wheel as a token of my affection, it being my

desire and expectation, that her mother will provide for her, she having fully in her power to do so. Item. I give unto my four daughters *Mary C. Nesbit*, *Charcilla Cockey Deye Owings*, *Penelope D. Price*, and *Frances Thwaites Deye Owings*, one family Bible each, they having been heretofore provided for by my uncle the late *Thomas Cockey Deye*."

Thus it appears to have been the intention of the testator *John C. Owings* so to dispose of his property as that the provision for each of his children, noticed in his will, should be entirely or nearly equal. That is, of his eight children, he himself provided for two; his uncle had portioned four; and a seventh he left to be provided for by her mother. Of his eighth child, *Cassandra*, he takes no notice in his will; she had married, disposed of herself, and was then resident at a great distance from him. It appears in proof, that the "desire and expectation," thus expressed by this testator, and the exclusion of his daughter *Charlotte* from any share of his property, was in consequence of, and founded upon an express promise made to him by the plaintiff, (at a time when it is admitted on all hands she was in a perfectly sound state of mind,) that she would give all her property after her death to their daughter, this defendant, in fee simple; and in full confidence, that this promise so made to him for the benefit of *Charlotte* would be faithfully observed and kept, he made his will, and in about one month afterwards died.

Some time after the death of *John C. Owings*, his son *John*, being sick and in a rapidly declining state of health, declared his intention to devise his estate to his sister this defendant, when his mother, the plaintiff, dissuaded him from doing so, and induced him to give it to his sister *Cassandra*, promising him, that if he would do so, she the plaintiff would provide for the defendant. Upon the faith of which promise he made his will, devised his estate to his sister *Cassandra*, and died. There is nothing said in the pleadings about this devise by *John* to *Cassandra;* or as to *John's* inducement for making it. But it may be fairly inferred, that the plaintiff was actuated by a strong feeling of equity towards all her children; and knowing, that she had promised to give her estate to the defendant, she wished *John's* to take another direction, and be given to *Cassandra*, in order to provide for her; and also to prevent the defendant from obtaining a double portion. Taken in this point of view, I have deemed it a matter which might be noticed as a corroboration of the proofs in relation

to the promise made by the plaintiff to her late husband for the benefit of the defendant.

There can be no doubt, that the plaintiff always admitted she had *intended* to give a life-estate, at least, in her property to the defendant. Much testimony has been collected in relation to what the plaintiff had said *since* the death of her husband, as to the manner in which she *intended* to provide for the defendant. But the greater part of these declarations are proved to have been made subsequently to that period of time when her mental decay had commenced; and therefore, so far as they may have been introduced as evidence of the affirmance of an equivocal or voidable promise, deserve little attention. But it is of no kind of importance to ascertain what were, at any time, the limits of the plaintiff's intended *bounty* to the defendant; because, as to that her will is the law. Therefore, all the testimony which relates to her declarations of *benevolent intentions*, may be at once put out of the case.

The question here is, not what the plaintiff at any time kindly intended; but whether she had made such a promise as is alleged, and what have been her admissions and acknowledgments of that promise, if any. As to which, it appears, that when the plaintiff was called on, at a time about the commencement of her intellectual decay, to say whether she had actually made any such promise to her late husband in favour of the defendant, or not; and whether any thing was then said about her giving to the defendant any thing less than an absolute estate of inheritance? she distinctly acknowledged, that she had made such an unconditional promise; and that nothing was then said about an estate for life. And the plaintiff has since made similar acknowledgments as to the nature and extent of her promise. The circumstance, that one of her children had been cut off from any participation in the father's property, because of her having promised to provide for such child, was calculated, from its very interesting nature, to make a strong and lasting impression, and likely to be distinctly recollected even after her mind had fallen into a great degree of decay.(*q*)

These acknowledgments of the promise are mainly corroborated by the circumstances of the late *John C. Owings*' family at the time of his death; and the disposition which he made of his estate by his will. His other children, there spoken of, having had estates

(*q*) Bennet *v.* Vade, 2 Atk. 325.

of inheritance given to them by himself, or his uncle, shews what was his understanding of the plaintiff's promise at the time it was made to him; and that in the "desire and expectation," expressed in his will, he alluded to a provision having the nature and extent of the others there made or spoken of, and not merely a fettered donation, or an estate for life only. Hence, all circumstances considered, I have come to the conclusion, that the promise was made by the plaintiff, and to the extent alleged by the defendant.

To constitute a valid contract, the performance of which may be enforced either at law or in equity, it must be founded on a sufficient consideration. That is, the moving cause of the contract must be some benefit to the person called on to comply with it; or a benefit to a stranger; or some damage or loss sustained by the party claiming the performance; which benefit or loss has accrued or happened at the request or instance of the party of whom the claim is made.(*s*) Upon a mere naked pact or agreement, not founded on any such consideration, no suit, according to our law, can be sustained either at law or in equity. In the case under consideration, the defendant, it is shewn, did sustain a loss by reason of the promise of the plaintiff.

This promise, however, was not made by the plaintiff to the defendant; and yet it is, in general, essential to the nature of a consideration, that it should move from the party asking a performance of the contract: for if such party is a mere stranger to the consideration, having himself sustained no loss, nor conferred any benefit on the opposite party, he himself has no claim to have such contract fulfilled. But a father is under a natural obligation to provide for his children; and therefore, a promise made to him for their benefit, as in this instance, may well extend to them. As where a father was about to cut £1000 worth of timber to raise a portion for his daughter, the heir promised him, that if he would forbear from felling the timber, he, the heir, would pay the daughter £1000. The father did abstain, in consequence thereof, from cutting the timber, and died. It was held, that the contract with the father enured to the benefit of the daughter, was founded on a sufficient consideration, and that the daughter might sustain an action upon it against the heir, and recover.(*t*)

(*s*) Bunn *v.* Guy, 4 East, 194; Violett *v.* Patton, 5 Cran. 150.—(*t*) Dutton *v.* Poole, 1 Vent. 318; Martyn *v.* Hind, Cowp. 443.

It is now regarded as the well settled doctrine of the Court of Chancery in England, that if a person had, before his death, communicated his intention to make, or alter his will, and give a legacy, or portion of his property, to a certain individual, and the heir, or any one else, had interposed, and prevented the making or alteration of a will by a promise to pay the amount of the proposed legacy, to transfer the property, or to give any thing else in lieu of it to the individual thus intended to be benefited; that the promise so made is binding, as being made on a consideration of loss to the individual; who may therefore enforce the specific performance of it in a court of equity. The statute of frauds has been repeatedly urged as an objection against such promises, and the objection has always been overruled. The parent or friend of the individual intended to be benefited, being put at rest, and relying upon such promise, dies in perfect confidence that it will be fulfilled. But if the individual who has been so disappointed of an express provision by the deceased, could not have the promise enforced, his loss would be altogether irretrievable. The heir, or person making it, would be suffered to frustrate the intention of the deceased; to practise a fraud with perfect impunity; and the statute of frauds, if it were allowed to apply, would be made to operate for the protection instead of the prevention of fraud.(*u*)

This doctrine, which has been so long and so well established in England, has been finally and solemnly recognised by the court of the last resort in this State. The case is to his effect: *Charles Browne* being seized of a considerable real estate in Maryland, declared his intention so to dispose of it, that if this eldest son and heir, *James Browne*, should inherit or succeed to the estate of *Andrew Cochrane*, in Scotland, then it should pass to and vest in his second son *Basil Browne*. Upon which *James* promised his father, that in the event of his obtaining *Cochrane's* estate, he would convey the Maryland estate to *Basil:* provided his father would make no will, and permit the Maryland estate to descend to him, *James*, as his heir at law. *Charles*, the father, in consequence thereof, died intestate, and suffered the Maryland estate to descend to *James;* who afterwards succeeded to the estate of *Cochrane*. Upon a bill filed by *Basil*, the promise was held to be founded on

(*u*) Chamberlaine *v.* Chamberlaine, 2 Freem. 34; Oldham *v.* Litchford, 2 Freem. 284; Thynn *v.* Thynn, 1 Vern. 296; Drakeford *v.* Wilks, 3 Atk. 539; Reech *v.* Kennegal, 1 Ves. 124; Dixon *v.* Olmius, 1 Cox. 414; Stickland *v.* Aldridge, 9 Ves. 519; Mestaer *v.* Gillespie, 11 Ves. 638; Chamberlaine *v.* Agar, 2 Ves. & Bea. 259.

a sufficient consideration, and it was decreed, that *James* should convey the Maryland estate to *Basil* accordingly.(*v*)

The defendant having, as appears in proof, lost, or failed to obtain an estate of inheritance, by reason of the plaintiff's having undertaken to give her such an estate in her property after her death, it is clear, according to the established principles of equity, that the defendant should, in some form or other, have the full benefit of that promise assured to her. The whole controversy is now, perhaps, as fully presented to this tribunal as it ever can be hereafter, by any other or different form of procedure. It would, therefore, seem to be incumbent upon the court now, finally to dispose of the whole matter, as well on behalf of the defendant as on the part of the plaintiff. To stop short with decreeing, that the deed of the 15th of June should be annulled, would be to dispose of no more than the one-half of the matter in dispute. It would be leaving the claim of the defendant, which has been so fully developed by the pleading and proofs, to be determined at a future day, and most probably between other parties; the defendant, if she lives, on the one hand, and the representatives of the plaintiff on the other, who may be very numerous; and the proofs, which are now strong and satisfactory, may be then very much wasted, or totally lost.

There are many cases in which this court, in order to dispose of the whole matter in controversy, grants the relief to which the plaintiff has shewn himself to be entitled upon terms. No one is allowed to take a fraudulent advantage of the weakness or necessities of another. As in cases of sales by expectant heirs; in cases between guardian and ward; in cases of usury, and the like. But in all such instances, when the court grants the relief prayed, it is upon the terms, that the plaintiff who asks equity shall do equity. And therefore, the fraudulent securities are allowed to stand for what is really due, or they are vacated only upon condition, that the plaintiff performs that which in equity and conscience he ought to perform.(*w*) Upon these principles this fraudulent conveyance of the 15th of June might be vacated only upon the condition, that the plaintiff should now, in conformity with her promise, make a settlement upon the defendant.

(*v*) Browne *v.* Browne, 1 H. & J. 430.—(*w*) Twisleton *v.* Griffith, 1 P. Will. 310; Hylton *v.* Hylton, 2 Ves. 548; Nesbit *v.* Nesbit, 2 Cox. 183; Wharton *v.* May, 5 Ves. 27.

On a proper bill to account, after a decree to account, both parties are considered as actors, and therefore, according as the balance may be shewn, there may be a decree in favour of the defendant, or in favour of the plaintiff.(*x*) But it is not essentially necessary, in other cases, that the decree should directly respond to the special prayer of the bill, by merely denying relief upon the case; or by granting it to the plaintiff, either conditionally or partially, or entirely as prayed. The matter in controversy being fully developed, a decree may, in several instances, be framed to meet the case disclosed, altogether apart from the relief which the plaintiff asks for himself.(*y*) As where a bill is filed against two or more defendants, and it appears that some of them are answerable only in the second degree, that is, as agents of a principal; in such case the principal will be first charged, and the agents only in the second degree, or upon the default of the principal;(*z*) and so too, where it appears that one is principal, and the others are sureties, the court will, if called on when about to give the plaintiff the relief he seeks, go on to decree over as against the one who is principal, that in case the decree in favour of the plaintiff is satisfied by the sureties, they shall be reimbursed by their principal.(*a*) And where there are two or more defendants, a decree may be passed as between any two of them, when a case is made out between them by evidence arising from the pleadings and proofs between the plaintiff and defendants.(*b*) And also where, on a bill for a specific performance, the defendant proves an agreement different from that insisted on by the plaintiff, he may have a decree upon his answer submitting to perform the agreement; and this without a cross-bill, which was formerly deemed necessary.(*c*) And it has been the practice of this court in similar cases, without a cross-bill, to decree as well in favour of the defendant, as of the plaintiff, where it appeared from the nature of the agreement or transaction between them, that each was bound to pay money or to perform some act for the benefit of the other.(*d*) And even a direct decree in favour of the plaintiff may, in its consequences,

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(*x*) Done's case, 1 P. Will. 263; Anonymous, 3 Atk. 691; Horwood *v.* Schmedes, 12 Ves. 316; Bodkin *v.* Clancy, 1 Ball & Bea. 217; Davis *v.* Walsh, 2 H. & J. 329; 1825, ch. 158.—(*y*) Johnson *v.* Johnson, 1 Mun. 554, note.—(*z*) The Charitable Corporation *v.* Sutton, 9 Mod. 356; 2 Atk. 406.—(*a*) Walker *v.* Preswick, 2 Ves. 622; Taylor *v.* Ficklin, 5 Mun. 25; McNiel *v.* Baird, 6 Mun. 316.—(*b*) Chamley *v.* Dunsany, 2 Scho. & Lefr. 709, 718; Conry *v.* Caulfield, 2 Ball & Bea. 255.—(*c*) Fife *v.* Clayton, 13 Ves. 546; Higginson *v.* Clowes, 15 Ves. 525.—(*d*) Dorsey *v.* Campbell, ante, 356.

operate as a decree binding his interests in like manner as if it had been passed directly against him. For it is now established, that if a bill filed by a mortgagor for redemption, is dismissed, the money not being paid at the time specified in the decree for redemption, that operates as a foreclosure; and is equivalent to a decree for a foreclosure.(*e*) Or there may be a decree against both parties, as where the contest is as to some private right of property, and it appears from the proofs, that the title is in neither, but in the State, both parties may be perpetually enjoined from using the property to the prejudice of the public.(*f*)

In such cases there can be no danger of surprise, or want of opportunity to adduce proof; because the indirect, inverted, or constructive decree, is confined to that subject alone, which the parties themselves have, by their pleadings, spread before the court. Here the bill and answer disclose the whole matter in dispute relative to the promise of the plaintiff, as fully as it could be done by a cross-bill. The defendant not only sets out and relies upon the promise of the plaintiff, but attempts to sustain the deed of the 15th of June, upon the ground of its being a mere fulfilment of that promise. Thus representing the promise as the original contract. This allegation of the defendant has been put in issue as a material part of the subject in controversy; and like every other part of the matter in issue, it may, without the unnecessary circuity and expense of a cross-bill, be met by such a decree as justice requires, either in favour of, or against the plaintiff.(*g*)

Here again, however, we are met by another obstacle, arising from the present unsound intellectual condition of the plaintiff. And that too, whether the decree in her favour be upon terms; or it be in part against her. But a change in the mental condition of a contracting party, by his becoming afterwards a lunatic, certainly ought not to release him from his liability. And it has accordingly been held, that the rights of the parties remain unchanged by such an act of God. The only difficulty is how to come at the remedy. If the legal estate is vested in trustees, a court of equity ought to decree a performance; but if it be vested in the lunatic himself, that, it was formerly held, might be an insuperable obstacle to any adequate relief here, because this court could by its ordinary powers

(*e*) Stuart *v.* Worrall, 1 Bro. C. C. 581; The Bishop of Winchester *v.* Paine, 11 Ves. 199.—(*f*) Penn *v.* Ld. Baltimore, 1 Ves. 454; Barclay *v.* Russell, 3 Ves. 436; Rex *v.* Leigh, 4 Burr. 2146.—(*g*) Harding *v.* Handy, 11 Wheat. 120; Stewart *v.* Mechanics and Farmers Bank, 19 John. 505.

only give relief by decreeing a conveyance, which the lunatic could not be ordered to make, because of his incapacity to contract.(*h*)

But here, although the legal estate is vested in the plaintiff herself; yet if the matter were left at law no relief could there be obtained against the plaintiff during her life; nor could a specific performance be obtained at any time against any one at law: therefore, from the very nature of the case, the relief necessary to meet it, can only be obtained, if at all, in a court of equity. It is laid down, that if a man by age, or disease is reduced to a state of debility of mind, which though short of lunacy, renders him unequal to the management of his affairs, the court will, in respect of his infirmities, appoint a guardian to answer for him, or to do other acts, as his interests, or the rights of others may require.(*i*) And it is said, that where one who could not be proved a lunatic was relieved from a deed obtained of him by fraud and imposition upon his weakness, it was further ordered, that he should not execute any future deed, but with the consent of the court.(*j*)

It was upon these authorities, that I passed the order of the 17th of April last. I deemed it then necessary to extend to the plaintiff the especial protection of the court; because of her age and infirmities. And if by reason of that infirmity merely, the court can in no way cause that to be done, which when in a sound state of mind she had bound herself to do, the most manifest injustice might ensue; and that too not from any substantial, but merely because of a technical or formal objection. If, as has been said, this court can declare, that she shall not hereafter execute any deed without its consent; the converse of the proposition seems necessarily to follow—that this court can by its consent or decree direct a conveyance to be made by her to the defendant according to the promise by which she is bound.

There can be no doubt, that a specific execution of this promise would be decreed against the legal representatives of the plaintiff

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(*h*) Owen *v.* Davies, 1 Ves. 82; Pegge *v.* Skynner, 1 Cox. 23; Hall *v.* Warren, 9 Ves. 611; Shelf. Lun. 429.—(*i*) Leving *v.* Caverly, Prec. Chan. 229; Sheldon *v.* Aland, 3 P. Will. 111, note; Bird *v.* Lefevre, 4 Bro. C. C. 100; Wilson *v.* Grace, 14 Ves. 172; Attorney General *v.* Waddington, 1 Mad. Rep. 321; Howlett *v.* Wildraham, 5 Mad. 423; Wartnaby *v.* Wartnaby, 1 Jac. Rep. 377; *Ex parte* Clarke, 2 Russ. 575; Chambers *v.* Donaldson, 9 East, 471; Whitehorn *v.* Hines, 1 Mun. 537; Horner *v.* Marshall, 5 Mun. 466; 1 Fonb. 64; Mitf. Plea. 103; Prac. Reg. 71. (*j*) Lord Donegal's Case, 2 Ves. 408.

if she were dead.(*k*) And it is equally clear, that if she were now in her sound mind she herself might comply with this promise either by a last will devising her property to the defendant; or by a deed to take effect after her death.(*l*) But she is not now, nor is she ever likely again to be in a mental condition, understandingly of herself, to execute any such instrument as can pass any right in her property. It has, however, been expressly provided, that persons *non compos mentis* seized or possessed of any lands bound by an agreement to convey, made by some person having a right to make such agreement, and therefore liable to a decree for conveyance on a suit for specific performance, shall convey and assure such lands in such manner as the Court of Chancery shall direct;(*m*) and that in all cases where a decree shall be made for a conveyance, and the party shall neglect to comply therewith, such decree shall be considered to have the same operation as if the conveyance had been executed conformably to such decree.(*n*)

Upon the whole, I am, therefore, of opinion, that there is now no other course left but to appoint a guardian for the plaintiff, who shall be directed to execute, in her name, to the defendant such a deed as shall be deemed a sufficient specific performance of her promise, to take effect after her death.

Whereupon it is *decreed*, that the said defendant, *Charlotte C. D. Owings*, be and she is hereby directed and required forthwith to bring into this court the original instrument of writing in the proceedings mentioned, purporting to be a deed made by the said plaintiff, *Colegate D. Owings*, unto the said defendant, *Charlotte C. D. Owings*, on the 15th day of June 1824, to be cancelled and annulled; and the same is hereby declared to be null and void; and the record which hath been made of the said instrument of writing among the land records of Baltimore County Court shall be and the same is hereby declared to be utterly void and of no effect whatever, because of the said instrument of writing having been obtained from the said plaintiff *Colegate D. Owings* by fraud and at a time when she was *non compos mentis*.

And it is further *decreed*, that *William Gwynn* of the city of Baltimore be and he is hereby appointed guardian of the said plaintiff *Colegate D. Owings* for the purpose, and with full power

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(*k*) Goilmere *v.* Battison, 1 Vern. 48.—(*l*) Drakeford *v.* Wilks, 3 Atk. 540. (*m*) 1773, ch. 7, s. 1; 4 Geo. 2, c. 10; Kilt. Rep. 249; Bullock *v.* Bullock, 1 Jac. & Wal. 583.—(*n*) 1785, ch. 72, s. 13; 1826, ch. 159.

and authority to make, execute, acknowledge, and deliver according to law a deed of conveyance as hereinafter described, in the name and behalf of the said plaintiff *Colegate D. Owings*, unto the said *Charlotte C. D. Owings*.

And it is further *decreed*, that the said plaintiff *Colegate D. Owings* forthwith execute, acknowledge, and deliver, according to law, by her said guardian *William Gwynn*, unto the said defendant *Charlotte C. D. Owings* a good and sufficient deed, thereby conveying all the real estate of the said plaintiff *Colegate D. Owings* in the proceedings mentioned, called "*John & Thomas' Forest*," unto the said defendant *Charlotte C. D. Owings*, her heirs and assigns for ever; and also by the same deed conveying, transferring, and making over unto the said defendant *Charlotte C. D. Owings*, her executors, administrators and assigns, all the personal property of the said plaintiff *Colegate D. Owings*, which shall be and remain at the time of her death. And in the said deed of conveyance it shall be expressly stipulated and declared, that the same shall in no respect take effect or have any force or operation whatever during the lifetime of the said plaintiff *Colegate D. Owings;* but the same shall take effect and be in full force and operation upon and immediately after the death of the said plaintiff *Colegate D. Owings*. And it shall be further expressly stipulated and declared in the said deed of conveyance, that if the said defendant *Charlotte C. D. Owings* shall die without leaving any lawful issue, in the lifetime, and before the death of the said plaintiff *Colegate D. Owings*, then and in that case the said deed of conveyance and every part thereof shall be utterly null and void to all intents and purposes whatever.

And it is further *decreed*, that the said defendant *Charlotte C. D. Owings* pay unto the said plaintiff *Colegate D. Owings* her full costs expended in this suit, to be taxed by the register.

Soon after the passing of this decree the plaintiff died, and yet an appeal was prayed in her behalf, and the case taken to the Court of Appeals. After which, by a petition signed by one of her solicitors the court was asked to pass an order directing the defendant to pay the costs as taxed by the register.

8th November, 1828.—Bland, *Chancellor*.—It may not be amiss here to observe, by the way, that in England an appeal from a decree in chancery may be had at any time within five years, with

a saving in favour of persons *non compos mentis.*(*o*) Here it is declared, that all appeals shall be made and entered within nine months from the time of making the decision, and not afterwards; unless it be alleged on oath, that such decree was obtained by fraud or through mistake;(*p*) but there is no saving in favour of persons *non compos mentis.*

Where a decree has been passed, as in this instance, affecting as well the real as the personal estate of the parties, and the suit abates by the death of either of them, as the realty passes to the heirs and the personalty to the administrator or executor of the deceased, in order to embrace the whole subject of the decree, it should be revived by or against both the heirs and personal representatives of the deceased party. But such a comprehensive revival of the suit is not in all cases indispensably necessary, as each class of the representatives of the deceased may revive and prosecute the suit to the extent of their respective interests, and no further.(*q*) It is said, that in England a suit cannot be revived merely to recover costs not taxed: this however has been regarded there as a very odd rule;(*r*) and having met with no instance of its having been acted upon by this court, I feel no hesitation in rejecting a rule which has been so often condemned, and which appears to be now reluctantly tolerated by the tribunal in which it originated. Be that however as it may, in this case the costs, it is alleged, have been taxed, and therefore the amount of them, as a liquidated decreed debt, on the death of the plaintiff passed to her personal representative. Consequently, in order to recover that debt this decree may well be revived by her executor or administrator alone; but no attempt appears to have been as yet made so to revive it.

Whereupon it is ordered, that the said petition be and the same is hereby dismissed with costs.

After which the case having been brought before the Court of Appeals, the appeal was dismissed. Owings *v.* Owings, 3 G. & J. 1.

(*o*) Shelf. Lun. 424.—(*p*) 1826, ch. 200, s. 14.—(*q*) Ferrers *v.* Cherry, 1 Eq. Ca. Abr. 4.—(*r*) 2 Mont. Dig. 524.

MACKUBIN *v.* BROWN.

In a creditor's suit the decree for a sale of the realty, being founded on the fact of the insufficiency of the personal estate, necessarily establishes that point; and, consequently, after that, the correctness of the administrator's accounts cannot be impeached for the purpose of turning a creditor, who had come in under the decree, away from the realty to seek payment of the personalty.

After the notice to creditors had been given, a sale had been made, and a distribution of the proceeds had been awarded to creditors, claimants, who had been infants, were allowed to come in soon after they attained their full age, and to have a further sale of the realty made for the satisfaction of their claims; and that too, after a partition had been made of it among the heirs of the deceased debtor.

A trustee, under a decree for the sale of property, who fails to bring into court, or to account for the proceeds of sale, or the bonds and notes taken by him to secure the payment of the purchase money, may be charged with the whole amount of the proceeds according to his report of the sales. But, by thus holding the trustee liable, the court does not thereby virtually exonerate any one else.

A trustee cannot be permitted to apply a part of the proceeds of sale without any authority from the court, and then to come in to have it allowed as a set off against the claim of the party to whom it was paid.

It appears, that *William Hammond* of Ann Arundel county, by his will and codicil, made on the 24th March 1807, after devising several parcels of his land to particular persons, and emancipating some of his negroes, directed, that all the residue of his real estate should be sold by his executors for the payment of his debts; and the surplus of the proceeds to be invested and applied in satisfaction of legacies, as therein specified among the children of his sisters; and he appointed *Basil Brown* and *William H. Marriott* his executors. After which he died; his will was proved according to law; and, on the 7th of October 1807, his executors by a note addressed to the register of wills renounced the executorship;(*a*) and administration, with the will annexed, was immediately granted to *Basil Brown*. And, on the same day, *Basil Brown* filed his petition in this court, stating these facts and alleging, that he was interested in the estate as appeared by the will, and prayed that a trustee might be appointed to carry the will into effect.

Whereupon, and according to the act of assembly,(*b*) a decree was passed *ex parte*, on the 12th of October 1807, directing the real estate of the late *William Hammond* to be sold; and *Basil*

(*a*) 1798, ch. 101, sub-ch. 3, s. 7; Dep. Com. Gui. 69; 3 Bac. Abr. 43.—(*b*) 1785, ch. 72, s. 4.

Brown was appointed the trustee to make the sale upon the terms, that the purchaser should pay one-fifth of the purchase money on the day of sale, and give bond with approved surety for paying the residue in four equal annual instalments with interest from the day of sale. In virtue of this decree the whole was sold at four different times. The last of which sales was made on the 25th of August 1809; and all of them were finally ratified. It does not appear, from any thing to be found among the proceedings, that any part of the purchase money, or any bond of any one of the purchasers, except that of *Lewis Duvall*, was ever brought into court by this trustee *Brown;* who died some short time previous to the 15th of June 1815. It appears, that the trust reposed in *Basil Brown* having been left by him unfinished at the time of his death, *Thomas H. Bowie* was, on the 15th of June 1815, appointed to complete the trust; who also having died before it was finally closed, *Israel Davidson* was, on the 5th of October 1825, appointed as his successor for that purpose.

After the death of *Basil Brown*, *Richard Mackubin*, on behalf of himself and the other creditors of *Brown*, on the 12th of June, 1816, filed this bill here, in which he alleges, that *Brown* had died intestate without leaving a sufficiency of personal estate to pay his debts; and thereupon prayed, that his real estate might be sold for that purpose. The heirs of *Brown*, some of whom were infants, were alone made parties; and, on the coming in of their answers, admitting the insufficiency of the personalty, a decree was passed, on the 28th of June, 1816, appointing *Matthias Hammond*, who was one of the administrators of *Basil Brown*, to make sale of his real estate for the payment of his debts; and upon the death of *Matthias*, *Rezin Hammond* was appointed trustee to complete the trust, and a part of the real estate of *Basil* was accordingly sold. Public notice was given as usual to the creditors of the late *Basil Brown*, to bring in their claims, and the time limited for them to do so had long elapsed.

On the 5th of July, 1826, *Eli Marriott* and *Cornelius Shipley* and *Sarah* his wife, filed their petition in this case, in which, after setting out those circumstances, they state, that *Eli* and *Sarah* are the children of *Mary Marriott*, the sister of the late *William Hammond*, and, as such, legatees under his will; that the shares to which they were entitled, were adjusted and awarded to them in that case; that *Basil Brown*, who as trustee made sale of the late *William Hammond's* estate, received the purchase money, but had

not, during his life, nor had his administrators, since his death, paid to them their legacies so bequeathed and assigned to them; and that these petitioners, *Eli* and *Sarah*, having been infants and but recently attained their full age, were therefore prevented from making an earlier application. Whereupon they prayed, that the present trustee might be ordered to make report of his proceedings; that they might be admitted to come in as creditors under the decree; that the proceeds of the sales already made, might be applied to the payment of their claims rateably with other claims; that the trustee might be ordered to make sale of so much more of the real estate as would be sufficient to satisfy the claims against the late *Basil Brown;* and that they might have such other relief as the nature of their case required, &c.

6th July, 1826.—BLAND, *Chancellor.*—Ordered, that the petitioners be, and they are hereby permitted to come in as plaintiffs and creditors in this case, as prayed; subject to all legal objections that may be made against their claims. And it is further Ordered, that *Rezin Hammond*, the trustee, be, and he is hereby directed and required to make report to this court of the proceedings had under the said decree for the sale of the real estate of the late *Basil Brown*. And it is further Ordered, that the said trustee proceed to make sale of so much more of the said real estate as, in addition to the sales heretofore made, will be sufficient to discharge all the claims that have been exhibited against the said estate.

On the 9th of August, 1826, *Samuel Vansant* and *Mary Ann* his wife, filed their petition, alleging that she was another of the children of *Mary Marriott*, and as such a legatee under the will of the late *William Hammond*. In other respects the matter, statements, and prayer of this petition were similar to that of *Marriott* and *Shipley*. On the 25th of January, 1827, *Marriott* and *Shipley* filed another petition, alleging that the trustee had made a report of the proceedings under the decree, but had taken no steps for a sale; and praying that he might be ordered to proceed to sell without delay; and, in respect to the great lapse of time, that the sale might be for cash; which was on the next day ordered accordingly. On the 6th of March following, they filed a third petition, in which they allege, that a copy of their last petition, and the order thereon, had been served on the trustee, but that, as they verily believed, he had taken no steps to sell the lands, and that he did not intend to execute his trust. Whereupon they prayed, that

he might be removed, and another trustee appointed in his place. And accordingly, by an order of the 8th of the same month, he was removed, and *Nicholas Brewer*, jun'r, appointed in his stead, who gave bond, and proceeded to execute the trust.

But on the 16th of April, 1826, *Thomas I. Stockett* and *Clarissa* his wife, filed their petition, in which they stated, that *Clarissa* was one of the children of the late *Basil* and *Henrietta Brown;* and, as such, was entitled to one-eighth part of the sum bequeathed by the late *William Hammond* to *Henrietta*, and also to one-eighth part of the real estate of the late *Basil;* and they objected to any further sale being made of the real estate of the late *Basil* as prayed by the petitioners *Marriott* and *Shipley*, and *Vansant* and wife; first, because, their claims were not brought in within the time limited by the notice to the creditors of the late *Basil;* and his creditors, who had come in according to that notice, having been satisfied, a partition of the residue of his real estate had been, long since, made among his heirs, of whom *Clarissa* was one: secondly, because the personal estate left by the late *Basil* was sufficient to pay all his debts, if it had been properly administered; but it had been wasted; and the administrator alone was now liable to these claimants: and thirdly, because the late *Basil* ought not to be charged with these claims, since, although he sold the real estate of the late *William Hammond*, he had not received the purchase money, which, in fact, had been received by his administrator, *Matthias Hammond*. The petitioners further stated, that the trustee, *Nicholas Brewer*, had advertised the real estate of the late *Basil Brown* for sale, which would take place in a few days. Whereupon they prayed, that the sale might be suspended; that the claims might be rejected; and that they might have such relief as the nature of their case required, &c.

20th April, 1827.—Bland, *Chancellor*.—Ordered, that the matter of the aforegoing petition be heard on the eighteenth day of May next, or earlier with the consent of parties; and that depositions in relation thereto, taken before the commissioners appointed to take testimony in the city of Annapolis or before any justice of the peace elsewhere, on giving three days' notice as usual, be read in evidence on the hearing. And it is further ordered, as prayed, that the said *Nicholas Brewer*, jun'r, the trustee, suspend all further proceedings until further order: Provided, that a copy of this order be served on the said trustee, and also on the former petitioners *Eli Marriott* and *Cornelius Shipley* and *Sarah* his wife, and *Samuel*

Vansant and *Mary Ann* his wife, or their solicitors on or before the twenty-third instant.

After which the matter was brought before the court, and having been discussed by the solicitors of the parties, the case was informally referred to the auditor for the purpose of stating accounts upon the principles assumed by the respective parties. But, as they could not agree as to some points deemed important, the case was again submitted to the Chancellor for his instructions upon the following questions:

"Can the heirs at law of *Brown*, in this stage of the proceedings, impeach the correctness of the administration accounts? Are those accounts to be presumed correct until the contrary is shewn by the heirs at law, or are the petitioning creditors bound in the first instance to prove the correctness of said accounts? Can those accounts be opened for the purpose of charging interest on balances in the hands of the administrators at any time prior to the passing of the final account?"

6*th July*, 1827.—BLAND, *Chancellor*.—The decree for a sale, having been founded upon the fact of the insufficiency of the deceased's personal estate to pay his debts, has necessarily established that point. Therefore the correctness of the administrator's accounts cannot now be impeached by the heir for the purpose of turning any creditor, who comes in after that decree, away from the pursuit of the real assets under it, to seek payment out of the personal assets. This general expression of his opinion, the Chancellor conceives, will be a sufficient answer to the three questions submitted. But if the solicitors have other views, or wish for more special directions, the Chancellor would rather hear them first.

Whereupon it is ordered, that this case be and the same is hereby referred to the auditor with directions to state an account accordingly, or such other accounts as may be required by either party.

On the 5th of September 1827, the auditor returned and filed his report of sundry statements made according to the nature of the case and as required by the parties. To this report both parties excepted, and the case was thus again brought before the court.

4*th October*, 1827.—BLAND, *Chancellor*.—The matter of the petitions filed in this case by *Marriott* and *Shipley*, and by *Vansant* with that of *Stockett* and wife in opposition thereto standing ready

for hearing, and the solicitors of the parties having been heard, the proceedings were read and considered.

Any further sale of the real estate of the late *Basil Brown* to satisfy the claims of *Marriott*, *Shipley*, and *Vansant*, is opposed by *Stockett* and wife on several grounds.

First, they rely upon the lapse of time as affording a presumption, that those claims were either satisfied or abandoned. But the fact, that these claimants were infants, and have but lately attained their full age, furnishes a satisfactory answer to this objection.

Secondly, they allege, that the personal estate of the late *Basil Brown*, in the hands of his administrators was amply sufficient to satisfy these claims and ought to have been so applied; and that these claimants cannot be allowed to proceed against his real estate until the personalty has been exhausted. This objection, if it had been sustained by the fact, would have been conclusive against the passing of the decree for the sale of his real estate. But, it is now entirely too late to make such an objection, after a decree expressly grounded upon an admitted or established allegation of the insufficiency of the personal estate to pay all the debts of the deceased. After such a decree no creditor, who may in all other respects be entitled to come in, can be turned away from proceeding against the real estate to seek payment out of the personal estate of his deceased debtor.

A third objection is, that these claimants should not be permitted to come in as creditors against the estate of the late *Basil Brown;* because, although he *sold*, he did not *receive payment* for the whole of the estate of the late *William Hammond;* and these claimants can only be considered as creditors of *Basil Brown* upon the ground, that he received those proceeds, a portion of which had been allotted to each of them. And it is also alleged, that a part of those proceeds were collected by *Matthias Hammond*, one of the administrators of *Brown*, after his death.

It has been the practice of the court to allow a trustee to make the sale in a manner, and upon terms different from those specified in the decree, where the interests of the parties appear to be in no way injured by doing so. And those concerned being always notified to shew cause, if any they have, why the sale should not be ratified, it has been found, that much good and no material injury has arisen by sanctioning deviations to this extent by trustees. The trustee is always directed by a decree, authorizing a sale upon credit, to bring into court the bonds or notes taken by him to secure

the payment of the purchase money. And this he should never fail to do, if it be not attended with much inconvenience, where the credit is long; because he thereby relieves himself from any responsibility by holding them; and enables the court, in those cases where any of the parties, may and choose to take the bonds in satisfaction of their claims, to have them, at once assigned and delivered over to them; and thus immediately to put an end to the suit. But for the purpose of enabling the trustee to collect the money, when it becomes due, it has been usual, and found convenient to allow him to retain the bonds and notes in his own possession. They are, however, so held by him at his own risk.

But the court has never been informed by the trustee *Basil Brown*, what became of the purchase money arising from the sales made by him. He has brought none of it into court; nor has he brought in any one of the bonds taken by him for securing its payment, except that of *Duvall's*, the amount of which, it appears, he himself afterwards received; and yet the whole amount of all the purchase money became due long before *Brown's* death.

It must be presumed, therefore, in this, as in all similar cases, where a trustee or agent undertakes and binds himself to collect money, or to bring into court those vouchers, by means whereof it may appear whether he has collected it or not, and fails to do so, that the money has actually been collected by him, and he must be charged with it; unless he can satisfactorily shew, that it had not come to his hands, or been applied to his use. The greatest inconvenience and the most serious evils would arise, if trustees, appointed by this court, were not held strictly accountable for the bonds taken, and money received by them. They undertake to perform duties of much importance, and to become the executive agents of the court; and therefore must be rigidly held to a faithful discharge of the trust reposed in them, in all that relates to the receipt of money, or the securities taken by them for its payment.(c)

As the late *Basil Brown* might and ought to have collected the whole amount of the purchase money, it must be presumed that he did so; and consequently he must be held liable for the whole amount; unless his representatives shew, that without his default, it was not received by him, or that it did not come to the use of him or his estate. This they have failed to do. His estate, there-

(c) Bennett v. Hamill, 2 Scho. & Lefr. 566.

fore, must be charged with the whole amount of the proceeds of the sales made and reported by him.

But although a negligent or unfaithful trustee may be thus held liable for the whole amount of any money which he undertook and became bound to collect, and of which he has failed to give any account whatever; yet the court, by holding him liable, would not be understood as thereby, in any case, exonerating any purchaser, surety, or other person, or subject, from any liability or lien that might have been enforced for the recovery of the same money. The party interested may, in the first instance, obtain satisfaction from such security; or the delinquent trustee may be first made to pay, and be then left to take the place of the claimant, and, so far as in equity he may be permitted to do so, to seek relief from others as he can.

Upon these principles, therefore, it is Ordered, that the exceptions of *Eli Marriott* and others, are sustained, and that of *Stockett* and wife is rejected. And the auditor's report, and statements No. 1, 2, 3, and 4, are approved; and the statements No. 5, 6, and 7, are rejected. And it is further Ordered, that the trustee, *Nicholas Brewer*, jun'r, forthwith proceed to make sale of the real estate of the late *Basil Brown*, as directed by the orders of the 6th of July, 1826, and of the 8th of March, 1827.

On the 20th of March, 1828, *Rezin Hammond*, the displaced trustee, filed his petition, in which he states, that being the executor of *Matthias Hammond*, who was administrator of *Basil Brown*, and trustee for the sale of the real estate of *Basil Brown*, he had paid to *Eli Marriott* the sum of $138, in part satisfaction of his claim against the estate of the late *Basil Brown*, to the amount of which he claims to be considered as the equitable assignee of *Eli Marriott;* and prays that the present trustee may be ordered to pay the amount to him out of the share awarded to *Marriott*. This petition was submitted without argument.

24th March, 1828.—Bland, *Chancellor*.—At no period, and in no part of all these proceedings does it appear, nor has it before been even intimated, that this petitioner had any such claim as that now set up by him; or any claim whatever against *Eli Marriott*. It does not very distinctly appear, whether the petitioner claims in his own right, or in his representative character of executor. But in either way, if the claim has any real existence whatever, it is a mere legal one; it has not a shadow of equity about it. It is for

money lent and advanced to *Marriott*, for which the petitioner may sue at law. But this delinquent agent of the court, after having been removed, now asks to have the sum he alleges he has paid *Marriott*, allowed as a payment made while he was trustee, without any authority, or even pretext of authority, from this court. Most certainly it cannot be allowed to him as a payment made as trustee. The petitioner takes another ground, which is, that he may be considered as an equitable assignee. But if he who had paid money, as set forth in the petition, could be let in as an equitable assignee, then all the other creditors of *Marriott* must be allowed to come in upon the same terms. But that could never be permitted. Whereupon it is Ordered, that the petition be dismissed with costs.

A sale having been made by the trustee, and ratified by the court, the auditor reported a distribution of the proceeds among the claimants, which was ratified on the 22d September, 1828, and the trustee directed to apply the proceeds accordingly, and the case thus finally closed.

WILLIAMSON *v.* WILSON.

The power to appoint a receiver is one of as great utility as any which belongs to the court, and is well established upon reason and authority.

Where there has been a breach of duty by a partner, or the firm has become insolvent, and a partner is wasting, or threatens to make an improper application of the funds, a receiver may be appointed before the coming in of the answer.

A receiver is considered as an executive officer of the court, bound so to keep the property placed in his hands, that it may be easily traced, and immediately produced when called for; and on his failing to do so, he, or, on his death, his personal representatives may be proceeded against in a summary way.

A partnership for a limited period may be dissolved before the expiration of the specified time by death or insolvency.

After a firm has become insolvent, the partners are to be considered as trustees for the benefit of their creditors; and therefore a suit between such partners may be treated as a creditor's suit, and the partnership estate collected and distributed accordingly.

Where evidence in support of a claim, in a creditor's suit, is within the knowledge of a co-creditor who has filed his claim, and thus become a party to the suit, he may be required to answer interrogatories on oath.

Where testimony is proposed to be taken in support of a claim, notice of the taking of it must be so given as that it may be presumed to have been fully and correctly reported to the court.

The mode of having creditors called in, and their claims adjusted before the auditor in a creditor's suit.

The originally suing creditor's claim having been decided upon, or so much of it as has been decided upon by the decree, cannot be afterwards drawn in question.

The statute of limitations, or any other just opposition, may be relied on or made against a claim brought in under the decree by any one of the original parties, or by a co-creditor.

After a reasonable time a final account may be ordered, rejecting all claims not then sufficiently authenticated.

By this bill, filed on the 3d of April, 1826, it is stated, that the plaintiff *Charles A. Williamson*, and the defendants *John B. Wilson* and *John N. Woodard*, had formed a partnership, as commission merchants and auctioneers in the city of Baltimore, on the 7th of April, 1824, for the term of three years from that date, by the name of *Wilson, Williamson & Co.;* that they gave bond, with *David Williamson* their surety, to the city as auctioneers; that the business of the partnership was carried on accordingly until the 4th of January, 1826, when the firm became insolvent and stopped payment; that the defendants have since held, and retained in their possession, exclusively, all the goods, effects, books, papers, and vouchers of the firm; and are collecting the debts due, and wasting and misapplying the property of the partnership, to the ruin of the plaintiff, and to the prejudice of the creditors of the firm. Upon which the plaintiff prayed for an injunction to restrain the defendants from collecting the debts; and that a receiver might be appointed to collect them and to take charge of, and preserve the goods, debts and effects of the firm for the benefit of all concerned. The bill was sworn to by the plaintiff in the usual form.

On the same day the bill was filed, it was submitted to the Chancellor, upon which it was ordered, that *David Williamson*, jun'r, be appointed receiver; and, that an injunction be granted as prayed. But leave was granted to the defendants to move for rescinding the order, and the dissolution of the injunction either before or after filing their answers on giving *five* days notice of such motion: and the register was directed to annex a copy of the order to the writ of injunction.

On the 12th of the same month the defendants, having filed their answers, gave notice to the plaintiff, that they should, on the 14th instant, move, as allowed by the order of the 3d instant. All the material admissions and allegations of the answer are sufficiently set forth by the Chancellor in his view of the case.

On the same day, and together with the answer of the defendants, *I. & J. Pogue* and others, as creditors of the firm, filed their petition objecting to *D. Williamson* junior being considered as a receiver; and recommending *Jacob Schley* to be appointed in his stead for the benefit of the creditors of the partnership. And, on the next day, the plaintiff filed exceptions to the answer of the defendants; and *David Williamson*, as another creditor of the firm, insisted by his petition on the receiver being continued.

24th April, 1826.—BLAND, *Chancellor*.—This case standing ready for hearing on the motion to rescind the order appointing a receiver, the counsel on both sides were heard, and the proceedings read and considered.

There have been, of late, many applications to this court for the appointment of a receiver. The power of making such an appointment, by some, has been contemplated as, at least, a new exhibition of the jurisdiction of this court. It seems to have been considered in the argument as one of an unsettled and questionable nature. That it is a power which has not, until of late, been very frequently resorted to may be admitted; but, there can be no doubt of its being an authority properly belonging to this court. In an order, passed about twenty years ago, the then Chancellor speaks of the power, as one which rightfully belonged to the court, and respecting which there was then no question whatever.(*a*) It is a power of the Court of Chancery of England, which appears to have been very frequently called into action during more than a century past. All the leading principles in relation to it were well established there, long before our revolution; and it was then, and has ever since been considered, there and here, as a power of as great utility as any which belongs to a court of chancery. And, that it is so, will appear very evident, from a review of the nature, and the variety of the exigencies in which it has been called into action; either to prevent fraud, to save the subject of litigation from material injury, or to rescue it from inevitable destruction.

Much the greater number of the English reported cases, concerning receivers, relate to real estates, and most frequently are such as have arisen between mortgagors and mortgagees. In almost all of them the office and duty of the receiver have been

(*a*) The Wharf Case, 1806, post, vol.

extended no further than to exclude trespassers, to make such repairs as are indispensably necessary, and to collect and account for the rents and profits. But, where the preservation of personal property has been the object, the receiver has been, in many respects, invested with the authority of a *curator bonis* of the Roman law. He has been directed to take into his possession all the moveables; and if any were of a perishable nature, to sell them. He has been directed to collect and sometimes to pay debts. Where there has been a breach of duty by a partner, a receiver has been appointed and charged with the winding up of an unsettled commercial concern.(*b*) And in all cases he has been held bound to render a strict account of his stewardship. A receiver is an officer of the court. He is considered as truly and properly the hand of the court; but his appointment determines no right; nor does it affect the title to the property in any way; it will not even prevent the running of the statute of limitations. The holding of the receiver, is the holding of the court for him from whom the possession was taken; therefore, should any loss happen it must be borne by him from whom the property was taken, not by the party at whose instance the receiver was appointed.(*c*)

But it has been argued, that a measure so prompt and vigorous, as that which has been adopted upon the present occasion, may be applied to the most pernicious purposes; that it is open to the greatest abuse; and that the consequences of such a procedure among commercial people, may become most mischievous and irreparably ruinous in its operation. I have meditated upon what has been urged in this respect.

That this court should have the power in unusual and pressing emergencies, at the instance of a party interested, effectually and without delay to put its hand upon property, so far as to prevent waste, inextricable confusion, or total destruction, seems to be admitted by all to be clearly right, or at least highly beneficial. The apprehension of abuse from such a power, when exercised by means of a receiver, seems to have arisen from a contemplation of the circumstances of this case. These parties were merchants, who had been extensively engaged in trade in the great emporium of our State. And, any merchant, it has been said, by means of this power of the court of chancery, may have his counting-house

(*b*) Peacock *v.* Peacock, 16 Ves. 49; Harding *v.* Glover, 18 Ves. 281.—(*c*) Pow. Mort. 294, note; 2 Mad. Chan. 233.

closed, his trade broken up, and his commercial reputation utterly blasted at a single blow, by a malignant application for the appointment of a receiver, founded on a statement of facts altogether fabricated and false.

There is one general answer, that may be given to this assertion; which is, that the plainest, most temperate, and best guarded forms of judicial proceedings, known to the common law, have been abused and made the instruments of malice. Of which the multitude and variety of the reported examples, in actions for malicious prosecutions and arrests, afford too strong proof: and, even in this very case, the defendants, by their answer, desire it to be recollected, that the well guarded common law process of replevin has been wantonly and grossly perverted and abused to their great wrong and injury. But upon the present occasion, since these applications have, of late, become more frequent, it may be well to consider this matter more particularly.

A receiver is never appointed before answer, but upon very strong special ground supported by affidavit;(*d*) or, as is the practice in this State, on a bill sworn to by the complainant; or, in case of his not being in this State, by some one conusant of the facts stated. A motion to rescind an appointment is always heard on a short notice; and a receiver is in no case permitted to take charge of the property without having first given bond with approved surety. So far then this chancery power is at least as little susceptible of abuse as the process of replevin, as is shewn by the example furnished by the defendants' answer. But, this is not all; there are other safeguards against the abuse of this power. The court always reluctantly interferes against the legal title, only in a case of fraud clearly proved, and of imminent danger; and a receiver will not be appointed when the matter in dispute depends on the legal title; unless strong grounds are shewn, and the rents and profits are in imminent danger.(*e*)

Where a plaintiff is permitted to come into a court of chancery in behalf of himself and other creditors, or may sue here because of the equitable nature of his claim, and in respect of a fund in the hands of the defendant, out of which he has a right to ask payment, he may, under certain circumstances, have a receiver put upon the property or assets liable to his claim. But under no other

(*d*) Duckworth *v.* Trafford, 18 Ves. 283.—(*e*) Lloyd *v.* Passingham, 16 Ves. 59; Norway *v.* Rowe, 19 Ves. 148, note; Maguire *v.* Allen, 1 Ball & Bea. 75.

circumstances does it appear, that the estate of a debtor may be put into the hands of a receiver at the instance of a *creditor*. In most cases the application is founded upon the fact, that waste, or peril has assailed or does then immediately threaten the property in question. But there are cases in which it may become necessary to interpose for the purpose of keeping the profits of an estate in litigation apart from those arising from another which is not the subject of controversy; on the ground, that they are likely to become so inextricably mingled as to render it extremely difficult or impossible to make a correct estimate of those of the litigated estate after the right to it shall have been regularly determined. In such cases the court will appoint a receiver of the rents and profits of the litigated property. As where certain wharves were claimed by the plaintiff in opposition to the city of Baltimore, a receiver was directed to collect the wharfage of those wharves, the right to which had been made the subject of litigation, and keep it separate from that collected for the use of other wharves under the authority of the city.(*f*)

This, however, is not the case of a third person attempting to stop the course of a firm, or of any one then actually engaged in trade; but is the case of a partnership where one of the partners has averred, that their trading has ceased, and that the firm is utterly insolvent, and thereupon asks for the appointment of a receiver as the only means of saving him and their creditors from the fraudulent practices of his co-partners. Now, in cases of partnership it must strike every one, that to whatever extent of malignancy, or fraud a partner might be urged or tempted to go in a condition of actual insolvency; yet, under other circumstances, his own interest would withhold him from attempting to have this power of the Court of Chancery applied to an unjust and pernicious purpose; for, it is rare that a man coolly indulges his malice to the ruin of his own interests. And, therefore, it cannot often happen, that a partner will deliberately abandon a gainful and prosperous traffic in which he is in the undisturbed participation, and maliciously endeavour to break it up, by fabricating such a statement as will induce the Chancellor to order the joint funds into the hands of a receiver.(*g*)

But, suppose a partner, in a prosperous and lucrative concern, to be actuated by such malignant feelings; how far could he carry

(*f*) The Wharf Case, post, vol. ii.—(*g*) Gow. Partner. 244.

the abuse of this power; and to what extent, by its means, could he injure his antagonist? The appointment of a receiver does not, of itself, divest any one of possession; it merely authorizes the receiver to demand, and to accept the possession when voluntarily delivered, or to take it when held by no one else. For, if the holder of the property refuses to deliver it, the receiver or party interested must apply to the court for an order to deliver possession, or to shew cause to the contrary. In all cases, where the order making the appointment has been made *ex parte*, and before answer, the defendant is allowed to come in at an early day and move to have the order rescinded. And, as regards third persons, who may have an interest in property thus ordered to be taken possession of by a receiver, they too are allowed, in a summary way on notice of motion, to come in and be examined *pro interesse suo.*(*h*)

Upon the whole, from whatever point of view this chancery power may be contemplated; or in relation to whatever of the various emergencies, to which it has been applied, it may be considered, it will be found in all respects as safe, and as little liable to abuse as any judicial procedure known to the common law. It will be found in practice, that little or no useless pressure can be produced in any case; and that, in no instance, can the mischief continue long before the party aggrieved may have an opportunity of being fully heard, and of obtaining complete relief.

This bill has been filed by one partner against his copartners, charging them with a design to consume and waste the joint property, or to apply it to their own use: and it avers, that the firm is absolutely insolvent. The answer denies these charges of the bill, but admits the insolvency of the firm; and then charges the plaintiff with a design so to apply the joint funds as to give an undue and improper preference to one or more of their creditors. These parties have, in many respects, given an opposite and very different account of the state of affairs between them. They both, however, admit the present insolvency of the firm; and agree, that according to the stipulations of their contract of copartnership, the term of its duration has not yet expired.

It seems to be admitted, where a specified period of time is limited for the continuance of a partnership, that neither party can, at his option alone, dissolve the connexion. But, although such

(*h*) 2 Mad. Chan. 245.

a partnership cannot be terminated at the pleasure of either party; yet, where, as in this instance, there is no express stipulation to the contrary, the partnership is virtually dissolved by the death of either of the parties. And it is said, that in England the bankruptcy of one partner operates, like death, as a virtual dissolution of the firm. In point of principle, and so far as relates to the matter now under consideration, there can be no difference between a bankruptcy, according to the English law, and an actual insolvency *in fact*, according to our law. So long as a man carries on his business and has a prospect of gain, he is not considered as insolvent; but if, in addition to such deficiency of property, his business so far declines as to leave him no prospect of paying his debts, he is then, according to the universal sense of mankind, insolvent. Whether he is declared to be in this condition according to the technical process of the English bankrupt law, or is admitted to be so in fact, the effect upon the contract of copartnership must be the same. The insolvency is the total destruction of the pecuniary capacity of the partner to fulfil his contract of copartnership. But his pecuniary capacity was the basis on which it rested. The contract itself, therefore, must be considered as effectually annulled, as if the party were dead. If both of them be insolvent, or dead, there is no efficient or living capacity left to execute the contract; if one only be dead or insolvent, the terms of it cannot be complied with; and where personal confidence was the principal inducement for making the agreement, as in contracts of this nature, it would be unreasonable; and, therefore, the other party shall not have the executor, administrator, trustee or assignee of the deceased, or of the insolvent, intruded upon him. Consequently, the partnership between these parties must be considered as having been virtually and effectually terminated by their insolvency. It can be extended over no new transactions, nor be allowed to expand itself any more. It must be wound up and brought to a close; and, except for such purposes, must be deemed to have totally ceased to exist.(*i*)

While a man continues solvent, the order in which he pays his creditors is a matter of indifference, since none can suffer; and therefore, no one creditor has a right to complain of the preference given to another. But so soon as he becomes insolvent, that pri-

(*i*) *Ex parte* Williams, 11 Ves. 5; Harding *v.* Glover, 18 Ves. 281; Vulliamy *v.* Noble, 3 Meriv. 614; Crawshay *v.* Maule, 1 Swan. 506.

vilege ceases; and equity requires, that he should make an equal distribution of his effects among them all. The giving of an undue and improper preference, under such circumstances, is denounced by the express provisions of our insolvent laws, as a fraud. And in all cases, where a court of chancery can be called on, and does interpose for the purpose of administering the assets of an insolvent debtor, it is governed by the rule of equality; because equality is equity. The assets, if insufficient to pay all, are always distributed proportionably. But, although this is the duty of an insolvent debtor; and is what a court of chancery will do for him in all cases, where his effects can be subjected to its control; yet if a creditor can fairly and legally obtain full payment from his insolvent debtor, equity will not deprive him of his legal advantage and compel him to refund.

These parties admit themselves to be insolvent debtors. The plaintiff charges his copartners, the defendants, with a design to waste the joint property, and to apply it to their own use. The defendants deny these allegations, and charge the plaintiff with a design to misapply the funds, and to give to some of the creditors an undue preference. Taking the charges of the plaintiff and of the defendants, or of either party to be true; or allow, that each or either party was about to waste the property, or has his favourite creditors to whom it is his design to give an undue preference; and it is clear, that one or the other or both of them have formed a fixed resolution to violate one of the great principles of equity, which it is the peculiar province of this court to prevent. None of the creditors of these insolvent debtors, so far as it appears, have, as yet, obtained any legal advantage. It is proper therefore, that this court should now lay its hands upon the joint property of this partnership, and let all its creditors come in *pari passu*, and according as their respective priorities, if any, should appear. Both parties profess to have had this equitable distribution in contemplation; both acknowledge themselves to be in that insolvent condition, in which the making of such an equitable distribution has devolved upon them as a duty. And yet each charges the other with having made an effort, and formed a fixed design to disregard this duty. Neither of them seems to have the least confidence in the other. Under all these circumstances, I consider this as a case, in which it is peculiarly fit and proper, that a receiver should have been appointed before answer, and should now be continued,

as a means of winding up the affairs of this partnership in safety, and with justice and equality to all concerned.(*j*)

It follows as a necessary consequence of appointing a receiver before answer, that the selection of the person to be appointed must be made by the Chancellor on the *ex parte* recommendation of the party applying for the appointment. In England, the selection of a suitable person is, most commonly, referred to a master, by whom both parties may be heard; but here, that duty must be performed by the Chancellor himself. And, in this case, the selection of a suitable person, as well as every other matter in relation to the application for the appointment of a receiver, is now as entirely open for consideration as if nothing had been previously done. The appointment that has been made may be rescinded; the continuance of a receiver may be altogether refused; or the appointment may be now made more suitable to the circumstances of the case.

The recommendations of those most interested, and who are most likely to sustain injury without an appointment of a receiver, have generally been most regarded. The being a near relation of either party is not in itself an absolute disqualification, but it must be allowed to have its weight when connected with other circumstances.

In this case I am of opinion, that the present receiver, *David Williamson* jun'r, ought to be removed. Jealousies have been excited against him. He is the brother of one of the parties, and the son of one who claims to be a large creditor of the firm. He is admitted by the plaintiff to have taken an active part in this controversy as his agent and friend. And he is charged by the defendants with having been active by undue means to their great prejudice. His feelings and affections appear to have become too much enlisted to permit him to be as unbiassed and impartial as a receiver ought to be in winding up the partnership affairs of these insolvent debtors.

Jacob Schley has been recommended by some of the creditors, or those who allege, that they are creditors of the firm; and the counsel of these litigating parties admit him to be in all respects capable and fit; I shall therefore appoint him. This receiver will, as usual, be at present invested with no other authority than to receive and take care of the effects of these insolvents; but any

(*j*) Peacock *v.* Peacock, 16 Ves. 49.

further authority and directions that may be necessary, will be given when applied for, and as circumstances may suggest and require. The compensation of the receiver removed, and of the one now appointed, will be determined on a representation of their trouble, skill, and merits, as to which the parties will be heard.

From what has been said the reasons for continuing the injunction must be sufficiently evident. It is, in this case, a suitable auxiliary to the appointment of a receiver; and therefore will be allowed to operate until the hearing or further order.(*k*)

With regard to the exceptions, that have been taken to the defendants' answer, it may be sufficient to remark, that from the manner in which they were treated in the argument, it did not appear, that the plaintiff wished them to be now decided upon; and, as it was not necessary to do so, they have been passed over for the present.

Whereupon it is ordered, that *Jacob Schley*, of the city of Baltimore, be and he is hereby appointed a receiver, with power and authority to receive and take charge and possession of the goods, wares and merchandise, books, papers, and effects of and belonging jointly to the said *Charles A. Williamson*, *John B. Wilson*, and *John N. Woodard*, lately trading under the name and firm of *Wilson*, *Williamson & Co.* And also with power and authority to sue for and to collect the debts due unto the said firm. And the said *Charles A. Williamson*, *John B. Wilson*, and *John N. Woodard*, and each of them, are hereby required to yield up and deliver unto the said *Jacob Schley* the goods, wares, and merchandise, books, papers, and effects of or belonging to the said firm. And it is further ordered, that before the said *Jacob Schley* proceeds to act as a receiver by virtue of this order, he shall give bond to the State of Maryland in the penalty of thirty thousand dollars, with surety to be approved by the Chancellor, for the faithful performance of the trust reposed in him by this order, or which may be reposed in him by any future order in the premises. And it is further ordered, that the said *David Williamson* jun'r, be and he is hereby removed from the office of receiver, to which he was appointed by the order of this court of the third instant; that he make report and render unto this court a full and fair account of all the property or money which may have come to his hands, and of all his proceedings

(*k*) Eden. Inj. 220.

while he acted as such. And he is hereby directed and required to yield up and deliver over unto the said *Schley*, so soon as he shall have been qualified to act as receiver as before mentioned, all the goods, wares and merchandise, books, papers, and effects of the said firm which may have been received by him the said *Williamson*, or which he may now hold or have under his control. And it is further ordered, that the injunction heretofore granted in this case be and the same is hereby continued in full force until the hearing or further order.

After which *Jacob Schley*, having filed his bond with approved surety as required, proceeded to act as authorized; and on the 8th May 1826 made a report, on oath, in which he stated, that he had obtained possession of the books and papers of the firm, and a large amount of their goods and effects, which, as he represented, it would be most for the benefit of all concerned to have sold at auction on a credit.

9th May, 1826.—Bland, *Chancellor*.—Upon consideration of the report of the receiver, it is ordered, that *Jacob Schley*, the said receiver, be and he is hereby authorized and required to sell the goods, wares and merchandise in the said report mentioned on a credit of four months for approved endorsed notes, according to the usual course and manner of selling goods at auction in the city of Baltimore. And he is hereby further authorized and directed to sell any other goods, wares and merchandise, being the joint property of the said parties, which may come to his hands, in such manner as he may deem most beneficial and best for the interest of all concerned.

It was also ordered on the same day, that the exceptions to the defendants' answer should stand for hearing on the first day of June then next. And on the 17th of July following, on the admission of the defendants' solicitor, it was ordered that the exceptions be sustained, and that the defendants make a more full and perfect answer on or before the first day of the next term. On the same 17th July, the plaintiff by his petition stated, that a large sum had been collected by the receiver, which he prayed might be distributed among the creditors of the firm; sundry creditors of the firm also filed their petitions in this case, alleging that the receiver had in his hands a large amount, which they prayed might be applied in satisfaction of their claims. And at the

same time the receiver reported, that he had a considerable sum in his hands, as to the disposition of which he prayed the order and direction of the court.

21*st July*, 1826.—Bland, *Chancellor.*—Upon these petitions of those who present themselves in this suit as creditors of the firm of *Wilson, Williamson & Co.*, it becomes necessary to consider this case in a new point of view; and to determine its general character, as well in relation to the original litigants, as to those who now propose to be admitted as parties, and have a control over its future course.

The bill states, that a partnership had been formed and conducted for some time between the plaintiff and the defendants, and that the firm had, just previous to the institution of this suit, become insolvent; these facts have been admitted by the answer. These original parties are then, at least to the extent of their joint concern as merchants, to be considered as insolvent debtors; as such they must, in equity, be regarded as mere trustees for the benefit of their creditors; and therefore neither of them can be allowed to derive any pecuniary advantage to himself from this suit. The proper and sole object of this bill is to have the funds of *Wilson, Williamson & Co.* collected and distributed, so far as they will go, among the creditors of the firm in satisfaction of their claims, according to the principles of equity. This matter has been brought here by insolvent debtors for the purpose of obtaining a partial discharge from the claims to which they are liable, and in that way to procure some relief to themselves. But the whole pecuniary benefit of the suit, must, according to their own admissions, be awarded to their creditors. The mere form and phraseology of the bill cannot materially affect the nature of the case which it brings before the court; and hence, although this is not a suit instituted by a creditor either for himself alone, or for himself and others, against his insolvent debtor; or against the representatives of his deceased debtor to have his real and personal assets administered for the benefit of his creditors; yet it is a suit which, by the express admission of the insolvent parties, has placed under the control of the court a considerable fund for the benefit of those who are the creditors of the plaintiff and the defendants jointly. It must therefore be considered in all respects as a creditors' suit; and these petitioning creditors must be allowed to come in as parties; and all the other creditors of this firm must be called on by a public notice, in the usual form, to bring in the vouchers of their

claims by a limited time, before any distribution can be made of the funds now in the hands of the court. With regard to the authentication of claims, and the conflicting rights of claimants, the court will be governed by its established rules in similar cases, as any such questions may arise.(*l*)

(*l*) BARNABY *v.* HOLLINGSWORTH.—The bill filed 2d July, 1787, states that John Barnaby, (who was not a defendant,) being indebted to the plaintiff Richard Barnaby, and sundry other persons, conveyed all his property to the defendants H. Hollingsworth, A. Todd, J. Field, and J. Warder, in trust for the benefit of his creditors; that the defendants took upon themselves the trust; obtained possession of the property conveyed, and have refused to distribute the money received, or to sell a part of the real estate, or to account. Prayer to account, for payment, and general relief, &c. The defendants answered, &c. It appears that, by an agreement of October, 1789, signed by the solicitors of the parties, the case had been referred to arbitrators; who, without the sanction of an order by the Chancellor, awarded, that the plaintiff was not the partner of John Barnaby, and that he was indebted to the plaintiff in the sum of £3200 14s. 3¼*d.*

28*th November*, 1789.—HANSON, *Chancellor*.—This case standing ready for decree, and the bill, answers, exhibits, and award aforesaid being read, and appearing as herein before set forth; it is thereupon *Decreed*, that the defendants Henry Hollingsworth, Alexander Todd, John Field, and Jeremiah Warder, trustees in the deed aforesaid mentioned in the complainant's said bill, bearing date the eighteenth day of January, in the year of our Lord one thousand seven hundred and eighty-seven, do account with the complainant, and render upon oath in this court, a full and particular statement of all the real and personal estate, debts due and owing to the said John Barnaby, and other property assigned and conveyed to the said defendants by the said deed of trust, and what part thereof hath been received by them or either of them, or hath come to their or either of their possession, and how the same and every part thereof, hath been applied and disposed of, subject to such future order and decree as this court shall make in the premises.

After which the defendants made out and filed an account, &c.; upon which the following decree was passed:—

May, 1792.—HANSON, *Chancellor*.—An interlocutory decree having been passed in this cause, for the defendants to account with the complainant, and to render on oath a full and particular statement of all the real and personal estate, debts, and other property of John Barnaby to them by the said Barnaby assigned, for the benefit of his creditors; and the said Henry Hollingsworth having in consequence thereof returned an account and statement on oath, by which it appears, that he hath in his hands, of the property so assigned by the said John Barnaby, the sum of six hundred and eighty-eight pounds, ten shillings and seven pence, current money, and also other property, not disposed of, and converted into money; and the complainant by a petition, this day filed, having prayed an order of this court to compel the said Hollingsworth to bring into court to be divided amongst the creditors of the said John Barnaby, the money in the hands of him the said Hollingsworth as aforesaid, and also the money by him received as trustee since rendering the said account:

It is thereupon *Ordered*, that the said Henry Hollingsworth do immediately bring into this court the said sum of six hundred and eighty-eight pounds ten shillings and seven pence, current money; and that he also render an account of, and bring into this court, all the money by him received as trustee aforesaid, to be distributed

Whereupon it is ordered, that the plaintiff give notice to the creditors of the firm of *Wilson, Williamson & Co.*, to file their claims in the chancery office, properly authenticated, on or before the fifteenth day of November next, by causing a copy of this order to be published in the *American* once a week for three successive weeks on or before the 21st day of August next.

After the publication of this order as directed, the plaintiff by petition stated, that many of the creditors of the firm had not brought in their claims; upon which it was ordered, on the 17th of November 1826, that the time for the production of claims be extended to the first day of December, and that public notice thereof be given by a publication of the order in the *American* newspaper. Proof of the publishing of these orders was made in the usual manner by filing a certificate of the editor of the newspaper in which they had been inserted. And many of the creditors of the firm having filed the vouchers of their claims, the plaintiff on the 9th of December filed exceptions to many of them for want of the requisite proofs and testimonials of authenticity; and against some because of their not being in their nature admissible as claims against this firm.

11*th December*, 1826.—Bland, *Chancellor*.—Notice having been given as ordered, to the creditors to exhibit their claims, and the case being now in a situation to have an account stated, on motion of the parties, it is ordered, that this case be and it is hereby referred to the auditor, with directions to state, from the proceedings and proofs, an account or accounts shewing the amount due from the firm of *Wilson, Williamson & Co.*, to each of their creditors who have exhibited their claims to this court; and also the

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amongst the creditors of the said John Barnaby, according to their claims and the intent of the deed of trust of the said John Barnaby to the said trustees.

It is further *Ordered*, that the creditors of the said John Barnaby have notice to exhibit their claims in this court, on or before the first day of September next, for the purpose of obtaining their respective dividends or just proportions of money arising from the property by him assigned for the benefit of his creditors; and that the said notice be given by having a copy of the order inserted in the newspaper of Goddard & Angel, at any time before the sixteenth of June next, and continued therein four weeks successively.

After this, notice having been given, sundry creditors exhibited their claims, and the auditor was directed to state an account apportioning the said sum among them, which was done, and confirmed, and the amount allotted to each directed to be paid accordingly.

proportion which each one of them may be entitled to receive out of the funds in the hands of the receiver after all just allowances have been made. And also to state such other accounts as the nature of the case, or the parties may require.

The first receiver, *David Williamson* jun'r, who was appointed on the third, and removed on the twenty-fourth day of April last, is hereby allowed one per cent. on the amount now about to be distributed among the creditors of the said firm. The present receiver *Jacob Schley* is hereby allowed eight per cent. on the same amount, as a compensation for his trouble in receiving the same; and in paying over to each creditor his portion thereof, according to the statement of the auditor, after it shall have been confirmed by the Chancellor. Each of these receivers are also to be allowed such expenses as they may either of them have incurred, as such, in the defence and preservation of the property committed to their keeping, and in the execution of the trust reposed in them; of which expenditures they shall produce before the auditor vouchers authenticated in the usual manner.

On the 13th February, 1827, the auditor made a report, with a statement of the distribution of the funds among the creditors who had then filed their claims. Assuming as directed the principles and rules of the court applicable to claims brought in under a creditors' bill, the auditor stated, that there were then filed thirty-two claims; that many of them were not proved as required; that others were founded on endorsed notes or joint liabilities, and those who were so jointly liable with the firm were not shewn to be mere sureties or insolvent; and that others were objectionable in their nature because of its not clearly appearing that they were properly debts due from the firm. This report, at the instance of the receiver, was revised by the auditor to rectify some mistakes as to the amount stated to be in his hands; and to let in some allowances to him for his expenses; and another statement was reported by the auditor on the 22d February 1827.

The plaintiff by his petition alleged, that the evidence to support his exceptions to the claims of *Charles Cappeau*, *Garrett Brown*, *Charles* and *J. Walker*, and *Lot Ridgely*, was within the knowledge of those parties respectively. Wherefore he prayed, that they might be ordered to answer those exceptions on oath.

30*th March*, 1827.—Bland, *Chancellor.*—Ordered, that *Charles Cappeau*, *Garrett Brown*, *Charles* and *J. Walker*, and *Lot Ridgely*

make answer on oath or affirmation to the exceptions as prayed by this petition, on or before the sixteenth day of May next, or shew good cause to the contrary: Provided a copy of this order and the petition and the exceptions therein referred to be served on each of them on or before the tenth day of April next.

On the 21st May following they filed their answer accordingly.

Lot Ridgely and others creditors of the firm on the 6th of April 1827, filed exceptions to the allowance of several claims as stated by the auditor; and at the same time by their petition prayed to have leave to take testimony in relation to their exceptions.

7th April, 1827.—Bland, *Chancellor*.—Upon this application it must be recollected, that in a creditors' suit, as this is, each creditor has a right to assume the position of a plaintiff, as against his debtor, whatever may be the nominal station of such debtor in the suit then depending before the court; that each creditor, having an interest in excluding the claims of all other creditors, so far as the admission of their claims to a participation of the funds would lessen the amount of satisfaction he would otherwise obtain, has a right to plead the statute of limitations, or make any objection to the allowance of any claims which the debtor himself could make under similar circumstances; and that each one of the debtors, or their representatives, may make any defence against a claim which he would be permitted to make if he alone were charged as the only debtor. Hence it follows, that in taking testimony in relation to such a contested claim, in order that it may be impartially taken, the party requiring it must give notice to the party directly to be affected by it, or to some one who has an interest in cross examining the witnesses, and having their testimony fully and correctly reported to the court. To give notice to all the creditors would be impracticable; and to indulge the parties in such cases in taking testimony without limit as to time would be contrary to reason and the usual course of the court in similar cases.

Whereupon it is ordered, that any creditor of the firm of *Wilson, Williamson & Co.*, whose claim is stated or noticed by the auditor in his report, and also the said copartners, be and they are hereby severally authorized to take the deposition of any witnesses in relation to such claims, before the commissioners appointed to take testimony in Baltimore; provided, that three days' notice be given as usual, by the creditor, in whose behalf the testimony is

proposed to be taken, to some two or more other creditors, or one or more of the firm or their solicitor; or by one or more of the firm, in whose behalf the testimony is proposed to be taken, to some two or more of the creditors or their solicitor. But the creditor against whose claim the testimony, when taken, is intended particularly to operate, must himself or his solicitor be so notified. And depositions so taken, subject to all legal exceptions, may be read in evidence; provided they are filed in the chancery office on or before the first day of May next.

The plaintiff by a petition filed on the 6th of April 1827, stated, that *Jacob Schley* the receiver was then dead; and that administration had been granted on his estate: upon which he prayed, that another receiver might be appointed, according to the recommendations therewith filed; to whom the administrators might be ordered to pay and deliver over the money, property, books, and vouchers of the firm which had come to the hands of their intestate. And on the 12th of the same month *John Scott*, who had been thus recommended by almost all the creditors, filed his remarks and propositions, in which he says, that he was willing to serve as receiver without any commission upon the money received by the late *Jacob Schley*.

4th May, 1827.—Bland, *Chancellor*.—A receiver appointed by this court must be considered as its agent or executive officer. He stands in a situation, as regards this court, in many respects analogous to that in which a sheriff is placed in relation to a court of common law.

It is made the duty of a sheriff by a *fieri facias* to seize and take into his possession the property of the defendant; to convert it into money, and to bring the money so made into court or pay it to the plaintiff. In this respect a sheriff acquires a possessory right to the property which he has been thus authorized to seize and take into his possession; he may maintain an action grounded on such right; and the defendant whose property has been so taken is discharged in toto or to the amount of the value seized in execution. And the sheriff alone is held answerable to the amount which has so come to his hands to the plaintiff, at whose suit the levy was made.(*m*)

The express terms of the order of appointment in this, as in all

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(*m*) Wilbraham *v.* Snow, 2 Saund. 47, note.

like cases, placed the receiver in a similar situation. He is regarded as a trustee in respect to the possession, care, and distribution of the property committed to his charge; and as such it is his duty to prevent the property, so handed over to his keeping, from being blended with his own, and to keep such clear and separate accounts of his transactions as receiver as will enable him at all times and immediately when called on to shew the amount of money and property in his hands; and so distinctly to designate it, as that it may be traced and followed into the hands of any one who may have wrongfully obtained possession of it.(*n*) A receiver is always required to give bond to account and submit to orders; and if he fails to account, or is, in any respect, delinquent as an officer of the court,(*o*) he may be proceeded against in a summary way by attachment; or his bond may be put in suit by *scire facias* in this court, or an action at law so as to charge him and his sureties.(*p*)

But here the receiver died before he had fulfilled his trust, and the question is, how far any of his rights, duties, and liabilities as such have devolved upon his personal representatives?

Where a sheriff has in his custody persons in execution and dies, the new sheriff must take notice at his peril of all executions against any person he finds in gaol; and that from necessity; because there is no one to make delivery or give notice to the new sheriff of the persons in custody when the former sheriff died. And if a prisoner should in the mean time, go out of the walls of the prison, it will not be deemed an escape as against either the late sheriff or his successor; because the prisoner will be considered as in the custody of the law, and may be retaken any where and at any time after.(*q*) A sheriff, having no property in prisoners detained by him in execution, leaves on his death no right, duty or responsibility, as regards them, to devolve upon his personal representative. But, in personal property taken in execution by him, he has in all cases a qualified interest, so far as to hold possession, to sell and make the money, wherewith to satisfy the plaintiff. And, for such purpose, he may hold and sell it even after his official term has expired and he has ceased to be sheriff.(*r*) From these principles it would seem necessarily to follow, where

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(*n*) Freeman *v.* Fairlie, 3 Meriv. 41.—(*o*) Anonymous, Mosely, 42.—(*p*) 2 Fow. Exch. Prac. 323; *Ex parte* Grimstone, Amb. 707; Davies *v.* Craeraft, 14 Ves. 143; Musgrave *v.* Medex, 1 Meriv. 49; 2 Harr. Pra. Chan. 120; Grant *v.* Stone, 1 Vern. 313.—(*q*) Westby's Case, 3 Co. 72.—(*r*) Wilbraham *v.* Snow, 2 Saund. 47 notes.

the sheriff dies at any time after he has levied the execution, and before he has brought the money into court or satisfied the plaintiff, that the personal property so taken in execution would pass to his executor or administrator as parcel of his estate, which should be kept separate, and applied exclusively in satisfaction of the claim for which it had been taken.

But the act of 1813, ch. 102, s. 1, has provided somewhat differently for this matter, by declaring, that where it appears by the return of the late sheriff, that the real or personal property so taken by him had not been sold, the court may, on motion, order a *venditioni exponas* to the new sheriff, upon which the property, which had been so seized, may be taken wherever found, and sold as upon the original execution.

This provision, however, extends only to cases where it appears by the return, that the property taken in execution specifically remains unsold; and therefore, where it does not so appear, or where the sheriff had made sale and died before the money was brought in or paid to the plaintiff, there, as the property or money in his hands had passed to his personal representatives, they must be held liable to the plaintiff for whose benefit the execution issued. And although no action can be maintained against the executor of a sheriff grounded on the misfeasance or breach of duty of his testator, yet the plaintiff may recover of the executor of the sheriff, in an action of debt, any money which he had levied under a *fieri facias* and had not paid over.(*s*) In Maryland the plaintiff would be allowed to recover his debt by a suit upon the sheriff's bond, and then the sureties who had thus been compelled to pay the debt would have a right to take the place of the plaintiff as against the representatives of the sheriff.

Upon analogous principles, on the death of a receiver appointed by this court, it appears to be clear, that in so far as he had a mere duty to perform, like that of a sheriff in safely keeping his prisoners, nothing could devolve upon his representatives; but that where he had acquired a qualified interest in personal property as a bailee, and which it was his duty to keep apart from his own, and account for; and where he had, in obedience to an order, sold and converted property into money, such property and money must be considered as having rightfully passed into the hands of his personal representatives, as the only, or the most sure means of saving

(*s*) Clerk *v.* Withers, 6 Mod. 299; Adair *v.* Shaw, 1 Scho. & Lefr. 265.

harmless the estate of the deceased from the liability to which he had subjected it, by becoming bound as a receiver.(*t*)

Hence, considering the property and money which the late receiver *Jacob Schley* had admitted to be in his hands, as having passed into the hands of his administrators, they must be viewed as standing in all respects in his place: and as the personal representatives of their intestate, there can be no more impropriety in proceeding against them in this court by an order *nisi*, followed by an attachment on their failing to shew good cause, than in subjecting them to an action at common law for the recovery of a debt due by their intestate, in respect of the assets which may have come to their hands. I shall therefore allow them to be proceeded against in the like summary manner as would have been permitted against their intestate himself were he now alive.

Whereupon it is ordered, that *John Scott* be and he is hereby appointed a receiver in the place of the late *Jacob Schley*, with full power and authority to act in all respects as *Schley* could or might have acted; that before *John Scott* proceeds to act as a receiver by virtue of this order, he shall give bond to the State of Maryland in the penalty of thirty thousand dollars with a surety or sureties, to be approved by the Chancellor, for the faithful performance of the trust reposed in him by this order, or which may be reposed in him by any future order in the premises; and that *John Scott* shall be allowed no commission for his trouble in receiving and distributing any property or money which may come to his hands under this order as receiver.

And it is further ordered, that *Anna B. Schley*, *John J. Mayer*, and *Henry Schroeder* jun'r, administrators of the late *Jacob Schley*, make report and render unto this court a full and fair account of all the property or money which may have come to the hands of their intestate, the late *Jacob Schley*, and of all his proceedings while he acted as receiver in this case; and also, that they render a full and fair account of all property and money which had so come to the hands of their intestate, and which may be now in their hands; and of their proceedings in relation thereto. And the said administrators are hereby directed and required to yield up, deliver over, and pay unto *John Scott*, so soon as he shall have been qualified to act as receiver as before mentioned, all the goods, wares, merchandise and moneys, books, papers, and effects of the firm of *Wilson*,

(*t*) Shelf. Lun. 151.

Williamson & Company, which may have been received by their intestate, and have come to their hands, or which they may now hold, or have under their control: Provided, that a copy of this order, together with a copy of this petition be served on them, on or before the tenth instant, to the end, that they may shew cause, if any they have, on the first day of June next, why they should not fully and in all respects comply with this order.

On motion it was also, on the same day, ordered, that the statements of claims heretofore made and reported by the auditor, be confirmed, and the receiver directed to apply the proceeds accordingly; except as to all those claims, that had been at all objected to by the auditor, or to the allowance of which any exceptions had been filed, which claims were suspended until further order.

On the petition and representation of the receiver *John Scott*.

21*st May*, 1827.—Bland, *Chancellor*.—It was and still is my understanding and intention to allow to *John Scott* as receiver no commission on any sums for the receipt and disbursement of which a commission had been allowed to the late receiver *Jacob Schley*; it being my determination, if possible, not to charge the estate with double commissions. I had presumed that the late receiver's account comprehended the whole estate; and that the commissions had been computed and allowed accordingly; but, should that not be the case, then the receiver *John Scott* will be allowed the usual commissions on all sums on which no commission had been previously charged and allowed.

After which the case was again brought before the court on the report of *Anna B. Schley*, *John J. Mayer* and *Henry Schroeder* jun'r, administrators of *Jacob Schley* deceased, made in pursuance of the order of the fourth of May last; and the receipt of *John Scott* the receiver therewith filed.

1*st June*, 1827.—Bland, *Chancellor*.—Ordered, that the said administrators bring into this court the sum of seven thousand four hundred and two dollars and fifty-one cents, the balance remaining in their hands after deducting the commissions and fees as set forth in their said report; which sum the register is hereby directed to deposite in the Farmers Bank of Maryland in the usual manner to the credit of this case. And it is further ordered, that the bond given by the late *Jacob Schley*, as receiver, be delivered up to the admin-

istrators to be cancelled; and that they with the sureties in the said bond, be finally discharged: Provided that a copy of the said report and of this order be served on the present receiver, on or before the twelfth day of this month. Unless good cause to the contrary be shewn during and before the close of the next July term by the said receiver, or by the parties to this case, or by some one interested therein.

Afterwards on the 19th April, 1828, copies having been served as required, and no cause shewn, the bond of the late receiver was ordered to be delivered up, and his administrators were discharged. This case still remained open, and the whole of the funds of the firm not having been finally disposed of, four other creditors filed the vouchers of their claims in the chancery office after the day limited by the orders of the 21st July and the 17th of November, 1826, and prayed to be allowed to come in for a due proportion. The auditor reported a statement of their claims as usual, at the request of the claimants; and also made several other reports at the instance of creditors who had supplied the want of proof or removed the objections to their claims, since the first general report; and several of those intermediate statements had been confirmed, and the claims ordered to be paid accordingly; after which the case was submitted to obtain an order for bringing it to a final conclusion.

24th May, 1828.—Bland, *Chancellor*.—According to the course of this court, in creditors' suits, or where the case, by any proceeding, interposed after its institution, has been necessarily cast into the form of a creditors' suit, it is indispensably necessary, before any distribution can be made, or satisfaction awarded to any of the creditors, that they should be called on by a publication in some newspaper, or other public notice, to file the vouchers of their claims in the chancery office, on or before a specified day, most commonly four months after the day of the first publication; but a shorter period may be limited where the funds are small, or the transactions appear to be but little dispersed. After the time allowed to the creditors for bringing in their claims has expired; the auditor, at the instance of any one concerned, may make and report an account distributing the whole of the funds in full satisfaction, or in due proportion among the creditors; giving a preference to those who may appear to be entitled to it. In this first general report, all the claims having any plausible or probable

validity, or which may ultimately be sustained by proof, are stated as of course by the auditor, who in this, as in all subsequent reports, in which he first introduces a claim to the notice of the court, informs the Chancellor of all the objections and special circumstances in relation to it, as they appear from the proceedings and vouchers submitted to him. But after the day limited for bringing in claims is passed, and at any time before the funds have been ordered to be distributed, any other creditor may bring in his claim, and he will be put upon a footing with the other creditors so far as it can be done from the funds then remaining in court, by restating the account at his cost.

In a proper creditors' suit the decree for a sale of an estate for the satisfaction of creditors, in general, is in itself a final decision in favour of the claim of the originally suing creditor; because there can be no such decree unless the plaintiff establishes his claim in whole or in part. And therefore in such case, where the whole amount claimed by the plaintiff has not been established, it is proper, that the decree should expressly specify the debt decided to be due; leaving the other claims or parts of claims of the plaintiff as stated in the bill to come in after, and be finally disposed of on the usual application for further directions as to them and other claims.

The auditor's first general report having prepared and arranged all the materials for the judgment of the court, is usually suffered to stand over as of course some short time, after it has been returned and filed; during which time, or before it was made, a plaintiff, or a defendant or a co-creditor, who has not by any previous act lost his opportunity or waived his right to do so, may plead the statute of limitations or put in any exception to the claim of any creditor, upon which he may ask the judgment of the court. If such exception presents a question of fact; an answer on oath may be called for, and proofs taken in relation to it; but if it presents only a question of law, then, or after the answers and proofs have been returned and filed, a day may be appointed for the hearing of the matter. But if after the lapse of a reasonable time no exceptions are taken to the auditor's first general report, it may be confirmed as to all claims, not objected to, and the payment of them be ordered accordingly. If a creditor finds it necessary to have time to obtain testimony to sustain his claim and remove the objections made against it, he may have time allowed him to collect his proofs for that purpose within or beyond the jurisdiction

of the court; and the decision may be postponed and the amount set apart to meet it reserved accordingly.

But after a reasonable time has elapsed; and where it does not appear, that any of the creditors whose claims have been objected to have been allowed time for further proof which had not then expired, and there are still some claims, the objections to which have not been removed, the case may be referred to the auditor with directions to state a final account excluding all claims not then sufficiently authenticated so as to bring the whole controversy to a final conclusion. This case now stands in that situation.

Whereupon it is ordered, that this case be and the same is hereby referred to the auditor with directions to state a final account, from which he will exclude all claims not now sufficiently authenticated; and also those from which the auditor's objections, as stated in his former reports, have not been removed. All objections heretofore filed by any party against the allowance of any claims, which have not been determined by the court to be valid, are hereby overruled.

Notwithstanding this order, the parties appear to have acquiesced in leaving the case open, or to have waived the right to call for a final account as ordered; for, on the 26th May 1830, a special confirmation of the auditor's report of the 22d of May 1828 was called for and ordered accordingly, by which it would seem that the case had been brought to a final termination; but the objections to claim No. 21, 27, and 28 having been withdrawn, the case was again submitted, upon which on the 3d of May 1831, it was sent to the auditor to state a final account as required by the order of the 24th of May 1828.

JONES *v.* JONES.

Land was not liable to be taken and sold to satisfy a debt due to a citizen, until made so by statute; but it might always be taken in execution to satisfy a debt due to the State; for which it is bound, by act of assembly, from the day of the institution of the suit.

Under a *fieri facias* levied upon the land of the defendant in his lifetime, it may be sold after his death.

By a sale of land under a *fieri facias*, it was held by the Chancellor, that it was thereby converted into personalty; and that the surplus should be paid to the personal representative of the deceased defendant; but the Court of Appeals held and ordered otherwise.

Land may by operation of several forms of judicial proceeding be converted into personal estate.

This court cannot order a sheriff, who has in his hands money made under an execution from another court, to bring it into this court.

This was a creditors' bill, filed on the 14th of February 1827, by *Hiram Jones* and *Elizabeth Jones*, against *Martha Ann Jones* and *Emeline Jones*, infant heirs of the late *Jesse Jones*, *Richard Spencer* jun'r, and *Edward Brown*.

The bill states, that the defendant *Spencer* had, on the 1st of October 1824, recovered two judgments against *Jesse Jones*, in his lifetime, the one for $230 with interest from the 23d of January 1823 and costs; and the other for $167 with interest from the 27th of May 1824 and costs; which two judgments *Spencer* had assigned to this plaintiff *Hiram Jones;* that *Jesse Jones* was, at the time of his death, indebted, by a single bill, to the plaintiff *Hiram Jones* in the sum of $79 25, with interest from the 4th of September 1823; that *Jesse Jones*, at the time of his death, was indebted to the plaintiff *Elizabeth Jones*, by bond, in the sum of $868 27 with interest from the 16th of April 1825; that *Jesse Jones* died intestate, seized of about twenty acres of land, leaving a widow and the two infant defendants his children and heirs at law; that there has been no administration upon his personal estate, the whole or nearly all of which had been sold under executions which had been levied upon it previous to his decease.

It further appears, from the bill and its exhibits, that *Thomas Dawson* had brought suit in Kent County Court, and, on the 17th of March 1823, recovered judgment against *Jesse Jones*, from which *Jones* appealed; that on the 7th of June 1824 the judgment of the county court was affirmed by the Court of Appeals, for the sum of $250 with interest from the 12th of July 1820, and costs;

that on the 1st of July 1824 a *fieri facias* was issued on this judgment, from the Court of Appeals; and on the 16th of August following this defendant *Brown*, being then sheriff of Kent county, levied it on a tract of land, the property of *Jesse Jones;* that *Jesse Jones*, after having made a partial payment to this sheriff, died in the month of August 1825; that after his death the lands which had been so taken in execution were, on the 3d of September 1825, sold by this sheriff *Brown*, subject to the dower of the widow of the late *David Jones*, and of the widow of the late *Jesse Jones;* that from the proceeds of the sale, this sheriff *Brown* had paid the whole amount due to *Dawson* with the costs; and had retained to the amount of his own poundage fees; and also the sum of $65 50 for the payment of taxes and officers' fees placed in his hands for collection, leaving a balance in his hands of $1451 38.

Upon all which the plaintiffs by their bill prayed, that the land of which *Jesse Jones* died seized might be sold; that the proceeds thereof, with the balance remaining in the hands of the defendant *Brown*, might be paid into the hands of a trustee appointed by this court, to be applied, under its direction, to the payment of their debts, and such other claims, if any, as might be due from the intestate *Jesse Jones;* and that they might have such other relief as was suited to the nature of their case.

The defendants *Spencer* and *Brown* each put in a separate answer; the infant defendants answered jointly by their guardian; and all of them admitted the truth of the allegations of the bill.

16*th July*, 1827.—Bland, *Chancellor*.—This case standing ready for hearing without opposition from the defendants, the solicitor of the plaintiffs was fully heard, and the proceedings read and considered.

The peculiar nature of this case seems to require a more than usually attentive consideration. Putting aside so much of it as relates to the small parcel of land of which the intestate died seized, about which there can be no difficulty; this is the case of a creditors' bill, in which it appears, that the real estate of the debtor had been taken in execution, during his lifetime, and sold after his death, leaving a balance, which even yet remains in the hands of the sheriff whose official term must have since expired, and who has been brought here as a defendant, unassociated with any personal representative of the intestate. These circumstances present a case in which it becomes necessary to determine the extent of the power of the sheriff to follow out, after the death of the defendant,

the authority conferred on him by the *fieri facias* he had previously levied; and if it should appear, that his authority to proceed with the execution was well founded, to ascertain whether the surplus of the proceeds of the sale, so made, is to be considered as real assets to be taken from the hands of the heirs, or to be accounted for as personal assets by an administrator of the intestate; and also to inquire whether there is any mode in which this court, by any exercise of power within its own legitimate sphere, can compel an officer of another and a superior tribunal to place a fund, now in his hands by their authority, under the direction of this court to be disposed of as prayed by these plaintiffs.

It was a well settled principle of the common law of England, that the real estate of a debtor could not be taken in execution at the suit of a citizen creditor, and sold for the satisfaction of the debt. This rule was considered as a fair and necessary result from the nature of the feudal tenures, according to which all the lands of that country were held. And, as the most liberal species of those tenures was expressly declared to be that by which all the lands of Maryland should be held, it followed, that real estate could be no further subject to be taken in execution here than the same kind of estate was liable in England.(*a*)

In the case of the king, however, an execution always issued against the *lands* as well as the goods of a public debtor; because the debtor was considered as being not only bound in person, but as a feudatory who held mediately or immediately from the king; and therefore, holding what he had from the king, he was from thence to satisfy what he owed to the king.(*b*) As a consequence of this liability, and for the public benefit, if a judgment was obtained against a public debtor by the king, he thereby acquired a lien upon the real estate of such debtor, which took effect not merely from the date of the judgment, but by relation from the commencement of the suit to the exclusion of all subsequent incumbrances.(*c*) In England the king's debt is preferred in execution and in the administration of a deceased's estate, to that of a citizen; which right of preference was in Maryland extended to the lord proprietary.(*d*) After our revolution it was held to have devolved, according to the principles of the common law, upon

(*a*) Charter of Maryland, s. 5 & 18; Gilb. Exch. 89.—(*b*) Gilb. Execu. 3. (*c*) Pow. Mort. by Coven. c. 23, s. 9; Gilb. Exch. 93; Rorke *v.* Dayrell, 4 T. R. 410; Sug. Pow. 184.—(*d*) 1650, ch. 28.

the State;(*e*) and it has been expressly declared, that all lands and tenements belonging to any public debtor, after the commencement

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(*e*) The State *v.* Rogers, 2 H. & McH. 193; Hollingsworth *v.* Patten, 3 H. & McH. 125; Murray *v.* Ridley, 3 H. & McH. 171.

Birchfield for the King *v.* Brown.—This bill was filed in the year 1713 by Maurice Birchfield, surveyor general of the southern district of America, for and on behalf of the king against Joseph Brown, Margaret Brown, Richard Bennett, and Richard Smith, the representatives and debtors of Peregrine Brown late of London, merchant, to recover a debt due from the deceased to the crown. The case standing ready for hearing was brought before the court.

9th October, 1716.—Hart, *Chancellor*.—Decreed, that the several tracts of land hereafter mentioned be sold towards satisfying and paying his sacred majesty king George the debt in the bill mentioned to be due from the deceased Peregrine Brown; and that the sale may be made to the best advantage, notice be given of such sale to begin the 28th day of April next, and to continue till the 20th of May following. And that every purchaser of the same, or any part thereof, shall have, hold, and enjoy the same to him, or them, by a good and perfect estate in fee simple, in such manner as if the said Peregrine Brown had conveyed the same according to the exigence of the law: viz. Turkey Point, one thousand acres in Cecil county, &c. &c.

After which the case was again brought before the court under other circumstances.

3d September, 1717.—Hart, *Chancellor*.—Ordered, that the persons discovered to be debtors to the estate of Peregrine Brown deceased, particularly James Frisby and Peter Carmack, be made parties to the bill filed in this court by Maurice Birchfield on behalf of the crown against Joseph and Margaret Brown and others. And that the personal estate and several debts due to Peregrine Brown, and mentioned in the answer of Richard Bennett and Joseph Brown, be liable to the demand of the crown in such manner as they would be to Peregrine Brown.

Some time after Peter Carmack, who, with others, had, by a separate bill, been made a party, put in his answer thereto, in which, among other things, he stated, that the matter in controversy had been referred to the arbitration of certain persons, who had made an award thereupon discharging him; upon which award he relied.

13th July, 1723.—Tilghman, *Chancellor*.—It seems, that Maurice Birchfield negotiated the affair with Carmack, by way of arbitration, and was fully apprised of the state of the accounts betwixt Brown and Carmack, and seemed well satisfied therewith and with the award, and that Peregrine Brown was considerably in his, the said Carmack's, debt. And it also seems, that Birchfield sues not in such manner as to entitle himself to the advantages due to the prerogative, nor agreeable to the statute of the thirty-third of Henry the eighth, chapter thirty-ninth, but rather as a common person, or assignee of a common person. It is therefore adjudged, ordered, and decreed, that the bill of complaint of the said Maurice Birchfield be dismissed, and that the said Maurice satisfy and pay unto the said Peter Carmack, —— pounds of tobacco for his costs sustained by reason of his unjust vexation in this part.—*Chan. Records, Lib. P. L.* 68, 317, 387, 392, 812, *and* 892; *Kilty's Rep.* 75, 205.

This, and other similar cases which might be adduced from the records, shew, that the Court of Chancery of Maryland, before the revolution, was, in many instances, resorted to as a court of exchequer. And, in relation to debts due to the State, it may be well to recollect, that, according to the English law, not only the real and personal estate of a public debtor are liable to be taken in execution and sold for

of suit against him, shall be liable to execution in whatever hands or possession they may be found.(*f*) By which legislative enactment the State's lien, as in England, relates not merely to the date of the judgment, but to the commencement of the action. Whence it follows, that the liability of the real estate of a debtor to the State to be taken in execution, and the lien of the State incident to such liability, are founded upon the common law and the acts of assembly passed in express relation to debts due to the State.

But the general rule of the common law in regard to the liability of real estate to be taken in execution as between party and party, was modified by a statute passed in the year 1285,(*g*) which made such estates liable to be partially taken in execution. This statute, which gave the writ of *elegit*, enlarged the remedy of the creditor by declaring, that, when a debt was recovered or damages adjudged, it should be in the *election* of the plaintiff to have a *fieri facias*, or to have all the debtor's chattels and the one half of his lands delivered to him until the debt was levied to a reasonable extent;(*h*) which gave the election immediately that the debt was recovered; and therefore the whole land was held to be bound from the day of the rendition of the judgment; and those concerned, it was presumed, might easily ascertain from the record by what judgments the lands of the debtor were thus bound.(*i*) But as some inconvenience arose, because, according to the common law, judgments took effect by relation from the first day of the term, it was in the year 1676 declared by the statute of frauds,(*j*) that the day on which judgments were rendered should be entered upon the record; and that purchasers should be charged from such time only, and not from the first day of the term whereof the judgment was entered. This then was the nature and extent of the judicial lien, as between party and party, with which the real estate of a debtor might become bound in Maryland as well as in England. And this judicial lien was afterwards mainly fortified and enlarged by a statute passed in the year 1732,(*k*) applicable only to

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the satisfaction of the debt, but that the State might also have, what is called, *an extent in aid*, or a process to be levied upon debts due from others to the public debtor to the fourth degree; thus taking in execution *choses in action*, and bringing the debtors of the State's debtor before the court to answer in a way similar to that of a garnishee under a foreign attachment *Gilb. Exche. ch.* 12. *Petersd. Abri. tit. Extent*, B. The act of Congress of the 20th of April, 1818, ch. 78, s. 8, gives a similar right, as against corporations, to the United States. *The United States v. Robertson*, 5 *Peters*, 659

(*f*) March 1778, c. 9, s. 6; November 1787, c. 40.—(*g*) 13 Ed. 1, c. 18.—(*h*) 2 Inst. 394.—(*i*) Gilb. Execu. 37.—(*j*) 29 Car. 2, c. 3, s. 14 & 15.—(*k*) 5 Geo. 2, c. 7.

the then colonies of Great Britain, and received as law in Maryland, which subjected the *whole* of a debtor's real estate to be taken in execution and sold for the payment of his debts.

Whence it appears, that the lien arising from the judgments of *Dawson* and *Spencer*, at their respective dates, fastened upon the real estate of *Jesse Jones*, adhered to it after his death, and would have followed it into whosesoever hands it might have passed until they were satisfied, or the right to sue out an execution upon them had become entirely barred. But a judicial lien of this kind may exist after the case has abated by the death of a party; and yet no execution could be immediately issued against the lands upon which it attached, after the death of the party, until the judgment had been regularly revived. And this was in fact the situation of *Spencer's* judgments. Hence although it will be necessary, in the further consideration of this case, to recollect the nature and extent of the judicial lien with which the real estate of *Jesse Jones* had been encumbered during his lifetime; yet the authority of the sheriff to make the sale he did, after the death of *Jones*, under the *fieri facias*, issued on *Dawson's* judgment, must be deduced from other principles of law.

By the common law a *fieri facias* bound the goods of the defendant from its *teste*, so that any sale made by him, after that time, was void; because it was thought, that, if it were not so, every execution might be avoided by a sale; and it was presumed, that the sheriff would execute such writs immediately; and that there would be thereby such notice in the neighbourhood as to prevent any deception or fraud. But this notion of a retrospective lien, going back to the *teste* of the writ, was abused; writs were taken out one under another, so as to obtain liens upon the goods of debtors, without delivering them to the sheriff, by which means their sales and all commerce were made uncertain. To prevent which it was declared, by the statute of frauds, that the goods should be bound only from the actual *delivery* of the writ to the sheriff; by which the old law was, in effect, restored, which supposed the writ to be delivered to the sheriff immediately from the *teste*.(*l*)

The mere seizure under the *fieri facias* does not absolutely or totally divest the defendant of all property in the goods taken; but the sheriff thereby acquires only a qualified property in them; commensurate, however, in all respects, to the performance of the

(*l*) Gilb. Execu. 14.

duties assigned him by the writ. He is responsible for the safety of the property, and therefore may have an action against any wrongdoer who attempts to injure it, or to take it from him. Yet, if before a sale the defendant pays to the sheriff the whole debt and costs, he is bound to redeliver the property so taken in execution. The statute of frauds was intended for the benefit of purchasers and creditors *only;* therefore, still, as relates to the party himself, the judgment and *fieri facias* relate to the first day of the term, or at least to the *teste* of the writ; so that if it be tested in the defendant's lifetime it may be taken out and executed after his death.(*m*) And so, on the other hand, if the plaintiff dies, after a *fieri facias* has been sued out, it may nevertheless be executed. And as the writ commands the sheriff to bring the money into court, it is his duty to do so accordingly, so that it may be there deposited to be paid, if the plaintiff be dead, to his executor or administrator, when he shall appear; or, if the defendant be dead, that the surplus, if any, may be paid to his legal representatives when they may come prepared to shew their right to it.(*n*) Hence it is clear, that this positive command of the writ, virtually and necessarily intercepts the property in its course, and evicts it from the hands of the executor or administrator of the deceased defendant, who died after it bore *teste.*(*o*)

These are the well settled principles of law in relation to the personal property of the defendant against whom the *fieri facias* issued. But, as in England real estate cannot be taken in execution under a *fieri facias*, there are no English adjudications in relation to a case, like this, where the *fieri facias* had been levied upon the real estate of the debtor. But, the statute,(*p*) which subjected lands to be sold for the payment of debts has been so interpreted, and carried into effect here, as to make no distinction whatever between the debtor's real and personal estate, so far as it may be affected by any execution bearing *teste* in his lifetime.(*q*) And therefore, by analogy to the principles of the English law, applicable to an execution against the personalty, it has been held

(*m*) Tidd, Pra. 915; Pow. Mort. by Coven. 275, 280, 515; Odes *v.* Woodward, 2 Ld. Raym. 850; Bragner *v.* Langmead, 7 T. R. 20; Docura *v.* Henry, 4 H. & McH. 480.—(*n*) Tidd, Pra. 915.—(*o*) Wilbraham *v.* Snow, 2 Saund. 47; Oades *v.* Woodward, 7 Mod. 94; Dr. Needham's Case, 12 Mod. 5; Waghorne *v.* Langmead, 1 Bos. & Pul. 572; Robinson *v.* Tonge, 3 P. Will. 400.—(*p*) 5 Geo. 2, c. 7. (*q*) Barney *v.* Patterson, 6 H. & J. 182; Davidson *v.* Beatty, 3 H. & McH. 616.

in this, and in other States, in which this English statute has been received, that by a *fieri facias* which bears *teste*, or has been levied, during the lifetime of the defendant, his real estate may be intercepted in its descent and evicted from the hands of his heir; who, if he happens to have obtained actual possession of the estate after the death of his ancestor, will be treated merely as a terre-tenant, whose interest cannot be allowed, in any manner, to retard, or turn aside the execution which had been thus, in fact, or by relation, sued out in the lifetime of the debtor.(*r*) Whence it clearly follows, that the sale of *Jesse Jones'* lands made after his death under the *fieri facias* issued on *Dawson's* judgment was, in all respects, regular and lawful.

The next inquiry is, how far the judicial proceedings, to which the real estate of *Jesse Jones* has been subjected, have produced a change in its character, or converted it from realty into personalty? And if it has been so converted, then it will become necessary to ascertain the exact point of time at which that very important change was definitively effected.

The writ of *fieri facias* commands the sheriff to have the money in court, there publicly to pay the party. He may himself pay the plaintiff; but if he does so, it will be at his peril; for he is only perfectly safe in bringing the money into court, according to the express command of the writ. The sheriff cannot deliver the property taken in execution to the plaintiff in satisfaction of his claim; he must sell it and bring in the money. The property of the defendant is to be taken and *converted* by a sale into *money;* and hence, if the judgment be afterwards reversed by writ of error, the defendant shall not be restored to the thing *in specie*, but the money for which it was sold; for the *fieri facias* gave the sheriff authority to levy the money of the goods, so that he was obliged to turn the goods of the defendant into money; and therefore, the restitution must be of what the execution had taken from him, which was *money*, and not the thing itself, for then no body would buy.(*s*) These are the well settled principles of the common law in relation to personal property taken in execution under a *fieri facias;* and the statute having made lands liable to the payment of debts, and subject to the like remedies and process as personal estate,—it follows, upon the same principles, that

(*r*) Sir William Harbert's Case, 3 Co. 12; Winstead *v.* Winstead, 1 Hayw. Rep. 245; Beatty *v.* Chapline, 2 H. & J. 19.—(*s*) Gilb. Execu. 16 & 20.

where lands have been sold, under a *fieri facias*, they must be considered as having been converted into personalty. So that if the judgment should be afterwards reversed, the title of the purchaser cannot be affected by it; for otherwise there would be no security in purchasing at sheriff's sales.(*t*)

Hence the surplus of the proceeds of a sale of lands, as well as of goods, remaining in the hands of the sheriff after a sale made by him under a *fieri facias*, can only be viewed as the surplus of that money which he was commanded by the writ to make and bring into court. And hence such surplus must be regarded in all respects as a portion of the personalty of the defendant.

From a case reported, as having been considered and determined by the General Court, it appears that *Philemon C. Blake* had given two bonds to the State for the performance of his official duties as sheriff; on which the State sued, and having obtained judgments on each of them, issued a *fieri facias* on the first judgment, and had it levied upon his real estate, which was sold for a sufficiency to satisfy the first judgment, leaving a surplus of £80, which was then in the hands of the defendant. The only question was, whether the State was entitled to a preference from the commencement of the second suit, over any judgments obtained against *Blake*, after that time. As to which it was held, that upon the State's obtaining a judgment against its debtor, the act of assembly(*u*) gave it a lien upon his lands by relation from the commencement of the suit, into whosesoever hands they might come; and therefore, that the State was entitled to have its second judgment satisfied out of the surplus in preference to any judgment rendered after the commencement of its second suit.(*v*)

The court is reported to have said, in delivering the reasons of their judgment, that "the surplus of the money arising from the sale of the said *Blake's* land, after satisfying the first judgment of the State, remaining in the hands of the defendant, *is to be considered as land*, and subject to the attachment of the State, issued on the second judgment, in preference to the claim of the plaintiff."(*w*)

But the only question was, whether the lien of the State continued to adhere to the proceeds of the sale. Whether they were to be considered as realty or personalty, was, therefore, a matter of no kind of importance; and so it appears from the general tenor

(*t*) Davidson *v.* Beatty. 3 H. & McH. 616; Barney *v.* Patterson, 6 H. & J. 204. (*u*) March 1778, ch. 9, s. 6.—(*v*) Davidson *v.* Clayland, 1 H. & J. 546.—(*w*) Davidson *v.* Clayland, 1 H. & J. 550.

of the arguments of the counsel, as well as of the opinion of the court. The question turned upon the construction of the act of assembly as to the continuance of the State's lien, and nothing more. The point, whether by a sale under a *fieri facias*, the *real* estate had been *converted* into *money or personalty*, or whether the surplus was to be regarded as real or personal estate, could not have arisen; because either alternative might have been assumed; and, upon the principles laid down, the decision must have been the same; and therefore, this point could not have been in the mind of the court and decided upon in that case. And besides, this act of assembly(*x*) does, in itself, most manifestly regard the surplus as money or personalty; for, it declares, that the sheriff shall sell the lands to the highest bidder, and shall retain sufficient in his hands to *pay the debt* and all costs, his own fees included, returning the *overplus*, if any, to the debtor; that is, he shall from the *money*, into which the lands have been converted, *pay the* debt, returning the overplus of that *money* to the debtor.

There is therefore nothing to be found in that case, when carefully examined, which can be considered as at all at variance with the general and well settled principles of the common law, according to which, in all cases where personal property has been legally sold under a *fieri facias*, it is held to be made into *money;* or, if it be realty, that it is by such sale converted into money, or *personalty*.

It frequently occurs in this court on creditors' bills, where the originally suing creditor claims by simple contract, and the land has been sold to satisfy his claim, that there afterwards come in mortgagees or judgment creditors; in which case the sale stands and is deemed valid, and their liens are considered as following and binding the proceeds of the sale; not because those proceeds are held to be realty; but because no act of any other creditor, or of the court can divest a mortgagee or judgment creditor of his lien upon the lands without giving him a satisfaction, according to the priority of his lien, out of the proceeds of the sale of that land which had been so bound. If, however, in a creditors' suit against the representatives of their deceased debtor, his lands are sold to pay his debts, leaving a surplus; or if, in a suit by a mortgagee against the heirs of the mortgagor, the mortgaged land is sold to pay the debt, leaving a surplus, in such cases the surplus is con-

(*x*) March 1773, ch. 2, s. 7.

dered as a part of the proceeds of the *real* assets taken from the heir; therefore, must be paid to him, not to the executor or administrator of his ancestor; and, consequently, can only be taken from him to satisfy other claimants, who may have an equity to be let in, after the distribution, by a special application, under the creditors' bill, or in the suit by the mortgagee, upon the ground of the insufficiency of the personal estate of the deceased.(*y*)

There are other modes of judicial proceeding by which real estate may be changed into personalty, or by which lands may be converted into money or *choses in action*. This often occurs under the acts of assembly directing the course of descents; according to which, where the lands of an intestate are incapable of being divided among his heirs without loss, they may, on application to the proper court of law, be ordered to be sold, and the proceeds of the sale, or the bonds of the purchaser, divided among the heirs. But, the exact point of time when the judicial proceeding, instituted for that purpose, had effected a change in the nature of the property, was considered as a most interesting question in its consequences to the relative rights of the parties. As to which it was held, after mature deliberation, that the mutation of the estate, from *real* to *personal*, may be determined to be complete when the commissioners' sale is ratified by the court, and the purchaser has complied with the terms of it, by paying the money, if the sale is for cash, or by giving bonds to the representatives, if the sale is on a credit.(*z*)

According to this rule, the mutation, from realty to personalty, can only be finally consummated by a series of separate and distinct acts: *first*, there must be a judgment or judicial authority given by the court to sell; *secondly*, the commissioners, or agents employed to make the sale, must have reported to the court, that they had, in pursuance of that authority, made a sale; *thirdly*, the court must have ratified the sale so made and reported; and *lastly*, the purchaser must have either paid the purchase money or have given his bonds to secure the payment of it to the party entitled. When all these acts have been done, the judicial function of the court, in relation to the subject, has finally terminated; and the fund which had been submitted to its operation has been, thereby,

(*y*) Pow. Mort. by Coven. 983; Bromley *v.* Goodere, 1 Atk. 75; Flanagan *v.* Flanagan, cited 1 Bro. C. C. 500; Banks *v.* Scott, 5 Mad. 493; Mackubin *v.* Brown, ante 410; Wright *v.* Rose, 2 Sim. & Stu. 323; Fenwick *v.* Laughlin, post 474.
(*z*) The State *v.* Krebs, 6 H. & J. 36.

changed from one kind of property into another; from real into personal estate.

With regard to the mutation of the estate, the rule in equity seems to be different; or, at least, it appears to have been held, that all *four* of those several acts are not essentially necessary to produce a conversion of the property from realty to personalty. For, where, on a bill in chancery to obtain a partition of the real estate of an intestate among his heirs, one of whom was then a *feme covert;* on the lands being deemed incapable of division, a decree was passed ordering them to be sold; and the trustee, appointed for that purpose, reported, that he had sold them accordingly; which sale was finally ratified by the court. After which, and before the purchase money had been paid, and before any order had been passed by the court, directing the manner in which the purchase money should be distributed, the *feme covert* died; and then her husband died. Upon which the interest of the *feme covert*, at the time of her death, was viewed in the nature of an equitable *chose in action;* her individual legal estate in the realty having been changed by the decree, the sale, and the ratification thereof, into a floating undivided interest of that kind.

Hence it appears, that, *in equity*, the mutation is effected by the mere preliminary operations of the court, or by those judicial proceedings which are always had as preparatory only to that partition of the property among the parties which is the sole object of the suit. And it was further held, that although the husband was a party to the suit, yet he could not be considered as having, by those proceedings alone, reduced this interest of his wife's into possession; because the proceeding only directs a sale of the property, and the proceeds to be brought into court. It professes not to ascertain the rights of the respective claimants; it makes no distribution, it awards no payment, either immediately or contingently, to husband and wife, or either of them; no such decree has passed as is equivalent to a judgment at law, which would vest the *chose* of the wife absolutely in the surviving husband; nor has any order been passed by the court directing the proceeds to be paid to the husband and wife, or to the husband alone. And therefore, although the real estate of the wife had been converted into an interest in the nature of an equitable *chose in action*, that is, into mere personal property of that description; yet, as the husband had not reduced it into possession during his lifetime, it passed to the

personal representatives of the late *feme covert*, not to those of her deceased husband.(*a*)

A married woman, who is entitled to an undivided part of a real estate, cannot be, in any way, deprived of it without her express consent; which, by the common law, can only be obtained by a *fine*, or, under the acts of assembly, by her privy examination and acknowledgment of a deed conveying it to another. From necessity, and for the purpose of effecting a partition of a real estate, which is incapable of division without loss, it may be sold and converted into personalty. But a change of the nature of property, in order to attain a particular object, should not divest the owner of his right to it, to any extent whatever. The conversion of a real estate into personalty, for the purpose of thereby awarding to a *feme covert*, more fully and exactly than could otherwise be done, her due share of it, ought not to be allowed to operate so as to impair her right to it, or to lessen her absolute control over it in any way whatever. When a married woman petitions for, or consents to have a partition made of a real estate, in which she is entitled to an undivided interest, and acquiesces in a sale of it, for the purpose of making a just division of its value, because of its being difficult, or impracticable to make a correct partition of it in kind without mutual loss, she ought not to be considered as having, thereby, virtually agreed to have her own absolute right to her share transferred to another, or in any way lessened or impaired. For if that were the effect of the judicial proceeding, then the inevitable consequences of a suit for a partition, in all such cases, would be, that the suit itself would operate as a partial or total extinguishment of the rights and interest of the *feme covert*. Because, if, by a sale, for the purpose of effecting a partition, the wife's share is thereby converted into personalty, which her husband may, at pleasure and without her consent, reduce into possession, the result will be, that she may thus be divested of her real estate without her express consent; and even if the husband were allowed so to take the wife's share as personalty, subject to what is called the wife's equity, then she could only have a *portion* of it settled upon her; whereas the *whole* of the proceeds of sale awarded to her are, in truth, but the substitute for her realty; and therefore, to do her justice, the

(*a*) Leadenham *v.* Nicholson, 1 H. & G. 275; Hammond *v.* Stier, 2 G. & J. 81; Cary *v.* Taylor, 2 Vern. 302.

whole should be settled upon her as land; unless she should expressly consent that the proceeds of sale should be otherwise disposed of.(*a*)

(*a*) Spurrier *v.* Spurrier, post 000; Iglehart *v.* Armiger, post 000.

Wells *v.* Roloson.—This bill, which was filed on the 12th of June 1815, states, that the late John Wells, by his last will, among other things, devised certain real estate to his children, as tenants in common; one of whom, Margaret, was to hold for life with remainder over to her children in fee; that Margaret had several children who are infants, and was then the wife of the defendant Richard Roloson; that the land was incapable of division; and that a division could not be obtained because of the infancy of Margaret's children. Prayer that the estate might be sold and the proceeds divided. The defendants answered, admitting the facts as stated.

20th July, 1816.—Kilty, *Chancellor*.—Let a commission be issued under the act to direct descents to persons to be named by the complainant.

After which the case standing ready for hearing, and being submitted, the bill, answer, exhibits, and return of the commissioners, together with all other proceedings having been by the Chancellor read and considered; it was on the 31st of December 1816 decreed, that the real estate be sold, and that William Gwynn be the trustee for that purpose, &c. A sale was accordingly made and confirmed. On the 25th of August, 1817, the auditor reported a distribution of the proceeds of sale after deducting costs, &c.; in which he says, that he had divided the balance among the deceased's children to be paid agreeably to his will,—that is, among others, to Caleb Davis and Mary his wife, one-sixth of the balance $963 86, and to Richard Roloson and Margaret his wife during her life, and thereafter to her children or their issue according to the deceased's will, $963 86.

23*d September*, 1817.—Kilty, *Chancellor*.—Ordered, that the above statement as reported be confirmed, and the proceeds applied accordingly, with interest on the commission and dividends, in proportion as it has been or may be received.

After which the trustee, referring to this last order, prayed, that he might be authorized to pay the dividend awarded to Margaret and her children to the register, that the same might be applied, invested or paid over as to the court might appear just and most conformable to the will of the said John Wells.

30*th September*, 1817.—Kilty, *Chancellor*.—The trustee is authorized to pay into this court, to the register thereof, the part of the proceeds of the sale mentioned in the above petition, to be deposited in the usual manner subject to the order of the court.

Which dividend having been brought into court accordingly, Margaret Roloson set forth, that she was willing and able to give good security; and thereupon prayed, that the dividend awarded to her might be paid over.

28*th October*, 1817.—Kilty, *Chancellor*.—On the application of Margaret Roloson the report of the auditor and the will of John Wells have been considered. A bond must be executed by Richard Roloson for the payment of the sum, to wit, $963 86 to the children of Margaret Roloson or their issue after her death according to the will of John Wells. The penalty of the bond to be 2000 dollars.

Mary Davis by her petition states, that her husband Caleb died on the 14th of June 1817, without having received any part of the proceeds of sale; that she had been advised by the trustee to take out letters of administration on the estate of her

It may well be doubted, whether it is within the constitutional competency of either the legislative, or judicial department of our

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late husband, or to obtain an order from this court for the share awarded to her and her husband by the order of the 23d of September 1817; but that she conceived herself entitled, in her own right, to the whole share as one of the children of the testator.

13*th February*, 1818.—KILTY, *Chancellor*.—This petition of Mary Davis has been considered; and the trustee is thereupon authorized and directed to pay the sum allotted to Caleb Davis and Mary his wife to the said Mary Davis, with interest as prescribed in the order of September 23d, 1817.

Roloson and wife by their petition alleged, that their share had been, as they were informed, paid by the trustee to the register, who they prayed, might be ordered to pay it over to them. To which petition was subjoined an order signed by Margaret, directing it to be paid over to Richard her husband.

21*st February*, 1818.—KILTY, *Chancellor*.—The parties should have known, that the money is deposited in bank and cannot be drawn by the register without the order of the court. If the petitioners elect to take a part of the money, as an equivalent to the use of the whole for life, it must be so stated; and witnessed, as to Margaret Roloson. The present petition and the order of Margaret Roloson are in general terms for the dividend, and would not justify the payment of any part of the money. The allowance will be three-sevenths of the whole sum.

Roloson and wife by their petition stated, that they elected to take a part absolutely instead of the whole for life. To which petition was subjoined a draft by Margaret, in favour of Richard, which was witnessed by T. W. Griffith.

24*th February*, 1818.—KILTY, *Chancellor*.—On the above application it is ordered, that the said R. and M. Roloson be allowed three-sevenths of the sum allotted to them for life; which, out of $963 86, amounts to $412 8½, leaving a fraction of one fourth; and a check will be ordered for that sum; and $74 98½ to R. Roloson as guardian of the children; making together the sum of $487 7 paid in by the trustee, and deposited. The further sums to be received applicable to the said allowance may be paid to the said R. Roloson as guardian to the children by the trustee when received or brought into court, with interest according to the order on the auditor's report.

David Wilson and Joseph Read set forth that they were the sureties of Richard Roloson, that he had deceived them; and that they did not consider themselves safe; that they had made application to the Orphans Court to be discharged, and they thereupon prayed that the dividends awarded to the infants might not be paid to Roloson.

7*th April*, 1818.—KILTY, *Chancellor*.—In consequence of the application of D. Wilson and of J. Read, the trustee is directed to pay any further sum, that may be received, applicable to the allowance to R. Roloson and wife and her children, into court for further order. A copy of this application and order to be sent to the trustee.

Adam Waltemeyer and Rachel his wife by their petition stated, that she was one of the children of Margaret Roloson; and as such was one of those who, under the will of John Wells, was entitled to take after the death of Margaret. Upon which they prayed, that the one-sixth of the proceeds, to which Margaret was entitled for life, might be so invested as that the interest or profits only should be paid to her during her life, securing the whole to the use of her children after her death.

25*th July*, 1818.—KILTY, *Chancellor*.—On considering the proceedings in this suit,

government to pass any law, or to do any act which shall result in thus divesting any one of his property, or impairing his rights without his express consent. It is a general rule of law, from which no court of justice should permit itself to deviate, that no citizen can, in any way, be deprived of his property without his consent; or otherwise than as a punishment; or as a means of compelling him to pay his debts, and comply with his contracts. If, being competent to consent, he refuses to allow his property to be applied to a public purpose, it cannot, even in that case, be taken from him without an adequate compensation. But, if the owner be incompetent to contract, or to manage his own affairs, a court of justice never undertakes, even to alter the nature of his property from realty to personalty, or the reverse; except from necessity and for his obvious advantage.(*b*) So too, although this court has been expressly authorized, by various acts of assembly, for the benefit of an infant, or person *non compos mentis*, to have his real estate sold and converted into personalty; yet, as he can give no consent to any such conversion, it is but just, that his rights and interests should be no further deranged or impaired than may be indispensably necessary; therefore, it has been expressly declared, that the proceeds of the sale of the real estate shall, in such cases, pass as realty to the heirs of such infant or person *non compos mentis*, as if no such sale had been made.(*c*)

An obvious consequence of this mutation of a wife's real estate into personalty, is, that it casts over the property thus changed, by what seems to be considered as the tacit consent or acquiescence

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and particularly the order of February 24th, 1818, allowing to R. and M. Roloson a certain portion of the sum reported instead of the use of the whole sum for life; the proportion of A. Waltemeyer of the residue including interest paid in is found to be $142 56, for which sum a check in his favour will be ordered.

Margaret Roloson by her petition stated, that conceiving herself entitled, during her life, to the interest arising from one-sixth of the purchase money received from the sale of the property in the proceedings mentioned, or such part thereof as now remained in the chancery office, she prayed, that the same might be invested in some way for her exclusive use and benefit; so that she might during her life receive the interest thereof, notwithstanding her coverture, for her own separate use; and not subject to the control of her husband, as she will receive no benefit whatever from it if paid to him.

24th February, 1820.—Kilty, *Chancellor*.—The petitioner is referred to the order of the 24th of February 1818, on her petition with her husband, by which a certain sum was allowed to him in lieu of her interest.

(*b*) 1 Mad. Chan. 339; High. Lun. 60, 69.—(*c*) 1800, ch. 67, s. 5; 1816, ch. 154, s. 9; 1828, ch. 26, s. 3; 1829, ch. 222.

of the wife, (but certainly without her privy examination or express assent,) all the law which regulates personal property belonging to the wife. As land, her husband could have only a limited and qualified right to and enjoyment of it; she could not be deprived of it without her solemn, free, and express consent, which if not given, it would after her death pass to *her* heirs; but as personalty, on being reduced into possession by the husband, it becomes absolutely his property, and may be wasted or disposed of by him without any control from her.(*d*) But subject to these principles in regard to the mutation of the property itself, the Court of Appeals has distinctly recognised the existence of that right of a *feme covert* in regard to her property which her husband may ask a court of equity to put into his hands, called "*the wife's equity;*" and which can only be secured to her by a court of equity.(*e*) In relation to which, it has been laid down, that where a husband comes into equity to obtain any of his wife's *choses in action*, the court will not receive her consent to bar her equity, until after the amount due to her has been ascertained; for, though she may not think $500 the proper subject of a settlement, she may think differently of $5,000.(*f*)

But although, in general, *choses in action* are not subject to be taken in execution, either at law, or in equity; yet this interest, which has been held to be in the nature of an equitable *chose in action*, will be so far considered as parcel of the realty as to be subject to be intercepted by an order of this court for the benefit of the creditors of the deceased debtor where his personalty has been exhausted, or where the heir to whom it has been awarded is the debtor and is beyond the jurisdiction of the State.(*g*)

The rules thus laid down upon this subject must however, as it would seem, be received with some qualification. The six heirs of an intestate instituted proceedings at law to have the real estate, which they claimed by descent, divided among them; on the commissioners having made return of its value, and that it would not admit of a division without loss; one of them elected to take the whole, at the valuation. After which, the elector having failed to pay the valuation, one of the heirs, who had not been satisfied, brought an ejectment, for his one undi-

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(*d*) Chaplin *v.* Chaplin, 3 P. Will. 245.—(*e*) The State *v.* Krebs, 6 H. & J. 37. (*f*) Jernegan *v.* Baxter, 6 Mad. 32.—(*g*) Baltzell *v.* Foss, 1 H. & G. 504; McCanthy *v.* Goold, 1 Ball & B. 389.

vided sixth part of the land descended, against the elector. Upon which it was held, that a legal estate in fee, in the land elected to be taken, cannot vest in the party electing to take, and pay the value, without his actually paying the persons entitled their just proportions of the value in money, or giving bonds to them for the same agreeably to the act of assembly.(*h*) Whence it would seem, that although the elector may be regarded as a purchaser; yet, by his election alone, the estate is not thereby changed from realty to personalty, or from an undivided estate into an estate in severalty, until the value, in money or bond, has been actually paid or given, although the judicial proceedings under which the election had been made may have been, long before, finally terminated.(*i*)

In the case now under consideration the court is informed, by the bill, that the surplus of the proceeds of the sale of the real estate of the late *Jesse Jones*, yet remains in the hands of the sheriff, who made the sale, in obedience to a writ of *fieri facias*, which emanated from the Court of Appeals of the Eastern Shore; and further, that there has been no administrator appointed to take charge of the personal estate of the intestate *Jesse Jones*.

I feel perfectly satisfied, that the surplus in the hands of the late sheriff, who is now here as a defendant, must be regarded as *personalty;* and as such belongs not to the heirs, but to the personal representative of *Jesse Jones*. But there is no such person here as a party to this suit; and, without such a party, I hold it to be impracticable, by any decree of this court, to affect this surplus; which, as personalty, can only be called for from the hands of the personal representative of the intestate to whom it rightfully and exclusively belongs. For, although creditors may be allowed to proceed against the heirs alone, in respect to the real assets descended to them, where there is no administrator, or the personalty has been altogether exhausted; yet they certainly cannot be allowed, in this way, to obtain satisfaction of their claims from a merely personal fund, to which they direct the attention of the court, without making the administrator, who alone can be entitled to such fund, a party to the suit.

Supposing however, that an administrator of the late *Jesse Jones* was here as a party to this suit; even then, this defendant *Brown*, the late sheriff, as regards his possession of this surplus, must be

(*h*) 1802, ch. 94; 1820, ch. 191, s. 20, 21, & 22; Jarrett *v.* Cooley, 6 H. & J. 258.
(*i*) Ridgely *v.* Iglehart, post.

considered as an officer of the Court of Appeals. But can the Chancellor order money, which has been legally placed in the hands of an officer of the Court of Appeals, subject to their control, to be brought into this court, to be disposed of here as may be deemed right, among the parties to this suit? This court might order an administrator, if there was such a person here as a party to this suit, to move the Court of Appeals to direct their officer, this sheriff, to pay this surplus to him the administrator. But the Chancellor can give no such direction to this sheriff; because in undertaking to control an officer of the Court of Appeals as to any disposition of money placed in his hands by their authority, the Chancellor would thus bring this court into direct conflict with the jurisdiction of that tribunal, which certainly ought not to be done in any manner or under any circumstances whatever. Money in the hands of a sheriff, or of a third person, cannot be taken under a *fieri facias;* and the correctness of this position generally is recognised by the attachment act,(*j*) which gives what is called a judicial attachment as against third persons. But even that process cannot be levied upon money which had been made, and brought into the hands of a sheriff by virtue of a writ of *fieri facias;* because no third person or other court can be allowed to interfere with the execution of his duty according to the command of the process of that court under whose authority he was acting.(*k*) Hence it is clear, that this sheriff *Brown* has been improperly made a party to this suit.

Whereupon it is ordered, that this case stand over, with leave to amend and to make proper parties.

Afterwards on the 6th of June 1828, the plaintiffs filed in this case the following judgment or direction of the Court of Appeals.

"Court of Appeals for the Eastern Shore of Maryland, June term 1828.—Ordered by the court, that *Edward Brown*, late sheriff of Kent county, pay to such trustee as the Chancellor of Maryland shall appoint, the sum of fourteen hundred and fifty-one dollars and thirty-eight cents, which sum of money the said *Edward Brown* as sheriff aforesaid, in his return upon a writ of *fieri facias* issued from this court at the suit of *Thomas Dawson* against *Jesse*

(*j*) 1715, ch. 40, s. 7; Parke's His. Co. Chan. 274.—(*k*) Turner *v.* Fendall, 1 Cran. 133; Armistead *v.* Philpot, Doug. 231; Willows *v.* Ball, 2 New Rep. 376; Fieldhouse *v.* Croft, 4 East, 510; Knight *v.* Criddle, 9 East, 48; Stratford *v.* Twynam, Jac. Rep. 418; 1831, ch. 321.

Jones, states to have remained in his hands after paying and satisfying the debt, damages, costs, and charges due upon the said *fieri facias*, and the taxes and fees due to him the said *Edward Brown* as late sheriff and collector of Kent county. The said sum of money being part of the *real estate* of the said *Jesse Jones* deceased. The Chancellor will distribute and dispose of the same as he shall deem equitable and proper."

Upon all which this case was again brought before the court and submitted without argument.

9th June, 1828.—BLAND, *Chancellor.*—*Decreed*, that in obedience to the order of the Court of Appeals for the Eastern Shore of Maryland, filed in this case on the sixth instant, the said sum of $1451 38, mentioned in the bill of complaint, be paid by the said *Edward Brown* to *John B. Eccleston*, the trustee herein after named; which money having been declared by the said order to be a part of the real estate of *Jesse Jones* deceased, when received by the said trustee he shall bring into this court to be applied under the Chancellor's direction, after deducting the costs of this suit, and such commission to the trustee as the Chancellor shall think proper to allow in consideration of the skill, attention, and fidelity wherewith he shall appear to have discharged his trust; that before the said trustee shall be entitled to receive the said sum of money, he shall file with the register of this court the bond herein after mentioned; that provided the said sum of money shall be paid by the said *Edward Brown* on or before the first day of January next, no interest thereon shall be demanded; but if not then paid he shall from that time be required to pay interest on the same.

It is further *decreed*, that the lands in the proceedings mentioned be sold, that *John B. Eccleston* be appointed trustee to make the sale, &c. &c.; and that the trustee at the time of advertising the said property for sale, give notice to the creditors of the said *Jesse Jones* to file the vouchers of their claims in the chancery office, within four months from the day of sale.

After which the trustee made sale of the real estate, which was ratified on the 13th of April 1829, and having received the surplus from the defendant *Brown*, and given notice to the creditors, who came in; the whole estate was finally distributed; after allowing to the two widows each a portion of the proceeds of the sale of the realty sold by the trustee in lieu of their dower.

DORSEY v. HAMMOND.

The auditor is a ministerial officer of the court. The general character and nature of his duties. His fees, being a part of the costs, the payment of them may be enforced, in a summary way, like costs Statements may be made by the auditor for the parties with or without the directions of the Chancellor.

The mode in which creditors are made to contribute to a creditors' suit.

In a creditors' suit the proceeds of the realty are to be distributed in the same order among creditors in which the personalty is to be distributed among those only whose claims have been so avouched as to authorize the Orphans Court to allow of their payment.

A claim may be contested so as to put the claimant to full proof; in which case if it be not legally established it must be rejected.

A judgment against an executor or administrator is no evidence against the heirs; against whom the claim must be authenticated as if no such judgment existed.

An absolute judgment against an executor or administrator is conclusive evidence against him of a sufficiency of personal assets in his hands.

After a claim has been decided upon, it cannot be again brought before the court in a different shape; except under such circumstances as would form a sufficient foundation for a bill of review, or a re-hearing.

This was a creditors' bill filed on the 13th of December, 1826, by *John W. Dorsey* against *Rezin Hammond*, the executor, and *Denton Hammond*, *Matthias Hammond*, and *Caroline B. Hammond*, infants and devisees of the late *Matthias Hammond*.

The bill states, that the deceased being indebted to the plaintiff, he had brought suit and recovered judgment against his executor the defendant *Rezin Hammond*, from whom he, the plaintiff, had received payments, leaving a balance due him of $3182 49; that the testator had died seized of a large real estate which he had devised to the infant defendants; and, that the whole of his personal estate had been exhausted and disposed of in payment of his debts. Whereupon the plaintiff prayed, that the real estate might be sold to satisfy the balance due him, and such other of the creditors of the deceased as should come in under this suit. The defendants by their answers admitted the facts set forth in the bill; and on the 19th of March 1827 it was *decreed*, that the real estate be sold, and that notice be given to the creditors of the deceased to file their claims in the chancery office within four months after the day of sale.

After which, on the representation of the trustee, that there was a large body of land, embraced by the decree, which it was thought most advisable to have laid off into lots and offered for sale in parcels, it was, on the 9th of May 1827, ordered that the surveyor

lay out the lands accordingly and make return of a plot thereof. And the trustee having reported, that he had made sale of the estate, as thus laid off into lots, and had given notice to the creditors of the deceased to file their claims as required by the decree, the sales were finally ratified, no cause having been shewn to the contrary after the usual order of publication.

On the 29th of February 1828, the auditor reported, that he had examined the proceedings and stated all the claims exhibited against the estate of the deceased, and an account between the estate and the trustee, in which the proceeds of sale were applied to the payment of the trustee's commission and expenses, costs of suit and survey, county taxes, and dividends on all the claims stated. But that claim No. 3 was not proved as required by the act of 1798, ch. 101 ; that claim No. 4 was against the deceased as surety, and that the insolvency of the principal debtor was not proved; and that absolute judgments had been recovered against the executor by the creditors for claims No. 3, 4, and 5, which judgments being conclusive evidence of the sufficiency of the personal assets to satisfy those claims, had destroyed the right of those creditors to resort to the real estate. On the 6th of March following the auditor made another report, in which he says, that he had admitted two other claims, and had re-stated the account, and had deducted the additional costs from the dividends allotted to the two newly admitted claims.

22*d March*, 1828.—Bland, *Chancellor*.—This case having been submitted, in relation to the claims reported by the auditor as No. 3, 4, and 5, on the remarks in writing of the solicitor of those claimants, the matter has been maturely considered.

It has been insisted, that the auditor had no right to make such objections, as those set forth in his report, to any claim. I do not recollect ever to have met with an instance in which an auditor's report has been opposed upon similar grounds before. I deem it therefore proper to say something upon this subject, not because I entertain any doubt, or perceive any difficulty, but from a wish that the practice and course of the court should be better understood.

From the nature of the cases brought before this court it is perfectly obvious, that calculations, dividends, and statements of accounts must often be required to be made for the elucidation of the matter, or as preparatory to a decree, or order. Formerly such accounts, or statements were most usually made under a special commission for that purpose, directed to certain commissioners who were

required to take testimony, to make the necessary statements therefrom, and to report accordingly to the court. Such commissions were frequently executed at a distance from the court, without any help or light from the pleadings, in which the claims and pretensions of the parties were set forth; and, without any immediate access to the Chancellor for explanation of principles, in case of any doubt, or difficulty with the commissioners. Such a mode of preparing and stating accounts must often have been attended with much expense and inconvenience; yet as it is a mode of proceeding properly belonging to this court, which has not been in any way expressly or virtually abolished, it may now be resorted to in cases where the books, documents and proofs are at a distance, and cannot, without much inconvenience, be brought into court, and lodged within reach of the regular auditor.(*a*)

(*a*) Clapham *v.* Thompson, *ante*, 123; Rutland *v.* Yates and Petty, MS., 25th August 1789.

Birchfield *v.* Vanderheyden, 12th July 1722.—After a commission to account, which had been issued to commissioners at a distance from the court, had been returned without any thing having been done, the plaintiff moved "for another commission to some persons in Annapolis to audite the same accounts for his more easy laying the accounts of the deceased before them;" which was granted.—*Ch. Rec. Lib. P. L. fol.* 891.

Dorsey *v.* Dulany.—This bill was filed, 11th December 1762, by the plaintiff against the administrator of his deceased partner, for an account, &c. The complainant and defendant, by their counsel, consented and prayed that a commission might issue to some persons to examine evidences and audite accounts in relation to the said case: whereupon commissioners were struck by the counsel of the parties in the usual manner, and a commission issued accordingly, directed to the several persons therein named and appointed, in the words following:

Maryland, Sct.—Frederick, absolute lord and proprietary of the province of Maryland, and Avalon, Lord Baron of Baltimore, &c.: To Dr. John Stevenson, Bryan Philpot of Baltimore county, Lancelot Jaques and George Clark of Ann Arundel county, gentlemen; greeting: Know ye, that we have nominated and appointed you, or any three or two of you to be our commissioners to examine evidence; as also to audite, state, settle and adjust all accounts in a certain cause depending in our High Court of Chancery, between Caleb Dorsey of Ann Arundel county, iron master, complainant, and Henrietta Maria Dulany, administratrix *de bonis non* of Edward Dorsey esq'r. of the same county, defendant: We therefore require you or any three or two of you, that at such time and place, as to you or any three or two of you shall seem convenient, you cause to come before you or any three or two of you all such evidences as shall be to you, or any three or two of you named or produced by either the complainant or defendant; and also to state, audite, settle, and adjust all accounts relating to the matter in dispute that shall be produced to you, or any three or two of you, by either of the parties, and that you examine them, and every of them, on their corporal oaths to be by you administered on the Holy Evangelists, in the presence of the said complainant and defendant, if they, having timely notice thereof, think fit to be present, touching their knowledge of any thing that may relate to the cause aforesaid; and that you reduce into writing such account as shall be stated and settled by you; and the same with the said depositions you send together with this our commission under your or any three or two of your hands and seals with all convenient speed to us in our High

But the Chancellor has been authorized to appoint an auditor during his pleasure.(*b*) This auditor is the calculator and accountant

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Court of Chancery. Witness ourself at the city of Annapolis, this 25th day of May, *Anno Domini*, 1763. REVERDY GHISELIN, *Reg. Cur. Can.*

On the back of the aforegoing commission was thus endorsed, *to wit.*—Baltimore county, October the 3d, 1763. Came the within named John Stevenson, Bryan Philpot, Lancelot Jacques, and Corbin Lee, before me the subscriber, one of his lordship's justices of the peace for Baltimore county, and severally made oath on the Holy Evangels, that they would well and truly audite, and state all such accounts as should be by the within parties respectively laid before them pursuant to the within commission, according to the best of their knowledge and understanding.

"To his Excellency Horatio Sharpe, esq'r, Chancellor of Maryland, &c.

"We the commissioners, within named, do hereby certify, that by virtue of the within commission to us directed we did, after being legally sworn thereto, and after the appointment, and due qualification of Mr. Daniel Chamier as our clerk and assistant therein, meet at the house of Mr. Daniel Barnet in Baltimore town, on the third day of October seventeen hundred and sixty-three, in the presence of Caleb Dorsey the within mentioned complainant, and Benjamin Beal of Annapolis, on the part and behalf of the within mentioned defendant, in order to adjust, audit, and settle all accounts relating to the matters in dispute between the said parties, and did there and then proceed to settle, adjust, and audite, and did there and then settle, audite and adjust in the presence of the said complainant, and the said Benjamin Beal, after hearing all the allegations of the said complainant, and the said Benjamin Beal, all accounts relating to the matters in dispute as aforesaid; which settlement appears by the annexed accompt and vouchers, and which we humbly submit to the approbation of your excellency."

After which the account referred to is entered at large, and then follows this decree.

14th February, 1764.—SHARPE, *Chancellor.*—It appearing to this court by the report made by John Stevenson, Bryan Philpot, and Lancelot Jacques, three of the four commissioners who, or three or two of whom were appointed to state, audite, settle, and adjust all accounts relating to the matters in dispute, that there is due to the said complainant Caleb Dorsey, six hundred and ninety-nine pounds ten shillings and four pence half-penny sterling, from the said defendant Henrietta Maria Dulany, as administratrix aforesaid, after deducting and discounting the bond and two promissory notes in the said defendant's answer mentioned, *to wit*, the bond of the said complainant to the aforesaid Edward Dorsey, dated the twenty-first day of February seventeen hundred and fifty-seven, conditioned for the payment of one hundred and fifty-six pounds nine shillings and eleven pence half penny, current money, at or upon the first day of April then next with legal interest, and the complainant's promissory notes to the said Edward Dorsey, one dated the fifteenth day of September seventeen hundred and fifty-seven, for sixty-two pounds two shillings and four pence sterling with legal interest, and the other dated the tenth day of October seventeen hundred and fifty-nine, for two hundred and fifty pounds and eleven shillings sterling with legal interest.

Whereupon this court doth think fit, and accordingly doth order and decree, that the said defendant Henrietta Maria Dulany, out of the goods, chattels, rights and credits which were of the aforesaid Edward Dorsey deceased at the time of his death, in her hands remaining to be administered, pay to the aforesaid Caleb Dorsey the said balance of six hundred and ninety-nine pounds, ten shillings and four pence half-penny sterling, and also that she deliver up to the said Caleb Dorsey, the said mentioned bond and two promissory notes to be by him cancelled, destroyed or otherwise disposed of as he shall think fit.—*Chan. Proc. Lib. D. D. No. J.* 315.

(*b*) 1785, ch. 72, s. 17.

of the court. He is stationed near to the Chancellor, and, when any calculations or statements are wanted, all the pleadings, exhibits and proofs are put into his hands, so as to enable him fully to investigate, and put the whole matter in proper order as required. As an incident to every reference of a case to the auditor, he is thereby virtually, if not expressly, as under a commission to audit accounts, authorized to take any testimony deemed requisite in relation to any account which may be necessary or which the parties may desire to be stated by him.(*c*) But, if it be necessary to collect proof from a distance, the parties may either have a regular commission, or be allowed, by a common order, to have it taken any where within the State, before any justice of the peace, on giving notice to the opposite party. All the materials, from which the auditor makes his calculations and statements preparatory to a final adjudication upon the matters in controversy, are thus, by various, cheap, and contemporaneous movements, brought together at one place, and before an officer conversant with the rules and principles by which the case is to be decided, by a court constantly stationary and always accessible. With such facilities, where the parties are themselves diligent, there can be no unreasonable delay, nor any difficulty, but what arises out of the peculiar ambiguity of the proofs, or the real complexity of the case.

The costs of the court are no more, in any case, than a just compensation for the labour required. The auditor's fees are considered as a part of the costs; and, as such, are always included in every general award of costs against a plaintiff or defendant; and the payment of them may be enforced, against the party properly chargeable, in the first instance, in the same summary manner as any other costs.(*d*) But in some cases it becomes a matter of doubt who is properly chargeable, in the first instance, with the auditor's fees. The law declares, that they are to be "paid by the party *desiring* such account to be stated." Upon which it has been held, that in all cases where an account is necessary in any manner to ascertain the claim of a party, he alone is chargeable, although he may not have specially *desired* the account; and in all other cases, where a party particularly instructs the auditor to state an account in a certain way, he alone is chargeable, upon the ground of its having been specially desired

(*c*) Prac. Reg. 309.—(*d*) Denny *v.* Wallace & Davidson, MS. 1806; Farrow *v.* White, 1 Jac. & Walk. 623.

by him.(*d*) The auditor is allowed by law $4 67 per day for every day he shall reasonably be employed in stating any account; which, by long established usage, has been construed to mean an allowance of that fee for every account, however short it may be. In this case the auditor has already stated two accounts, for each of which he has been allowed that fee; but in the most difficult cases, and where a statement and distribution are required to be made, among a great multitude of claimants, his fees have rarely altogether exceeded one hundred dollars in any one case.

Under a creditors' bill it is a rule, that all costs, including the expenses of the sale; the survey, if any be ordered, or required, either to lay off the land into lots, as in this instance, or to ascertain the quantity sold, where the estate has been sold by the acre; and all taxes, are to be first paid from the proceeds of sale; and the balance only rateably distributed among the creditors, who are, in that way, made to contribute in due proportion to defray the expense of the suit.(*e*) Yet, according to the course of the court, any other creditors may be allowed to come in, at any time, before a final account has been stated and ratified, and before the court has actually parted with the fund; but if, in order to give them a dividend, after the auditor has made his report, it is necessary to re-state the account; as it is made for their benefit exclusively, the costs of the re-statement are deducted from the dividends allotted to them as the terms upon which alone they can be allowed to come in and participate.(*f*) But this rule applies only where the proceeds of sale are insufficient to pay all, as in this instance; for if there be a surplus, there can be no reason why it should not be applied, as against the heirs or devisees, in full satisfaction of the principal, interest and costs of a just debt, to which they can make no well grounded objection.(*g*)

(*d*) Denny *v.* Norwood, MS. 1806; Denny *v.* Wallace & Davidson, MS. 1806. (*e*) Hare *v.* Rose, 2 Ves. 558; Shortley *v.* Selby, 5 Mad. 447; Bluett *v.* Jessop, Jac. Rep. 243.—(*f*) 2 Fow. Ex. Pra. 279, 254; Angell *v.* Haddon, 1 Mad. Rep. 528. (*g*) Bromley *v.* Goodere, 1 Atk. 75; Butcher *v.* Churchill, 14 Ves. 573; *Ex parte* Mills, 2 Ves. jun. 295; *Ex parte* Hankey, 3 Bro. C C. 504; *Ex parte* Deey, 2 Ball & B. 77; Tyson *v.* Hollingsworth, MS. 12th July 1808.

Low *v.* Conner.—This was a creditors' petition, filed 22d February 1790, praying, that the lands of James Conner might be sold to pay his debts, for which his personal estate was insufficient. 1st September, 1791, decree for a sale in the usual form. Sale made and reported. 4th March 1792, ordered, that the return of Joshua Townshend, trustee for the sale of the real estate of James Conner, this day made be approved; and that his proceedings and the sale by him made be approved, ratified and confirmed, unless cause to the contrary be shewn on or before the fourth day of

The objections urged against this report indicate an opinion of the solicitor, that the auditor had some how stepped beyond his proper sphere in making it as he has done. No officer should allow himself to deviate from the line of duty marked out for him by law. The auditor is properly a mere ministerial officer of the court. It is true, that he may legally administer an oath to a witness and take his testimony in relation to an account desired to be stated;(*h*) yet he has no judicial power; nor can the legislature constitutionally confer any portion of the Chancellor's judicial power upon him. He is not in any sense an arbitrator; nor is his report, under any circumstances, considered as obligatory on the parties, unless confirmed by the court. When a case is referred to arbitrators, the court divests itself of all judgment, and the arbitrators are constituted judges of the fact without appeal; on a reference to the auditor it is otherwise,—he is only to prepare the case as a minister for the Chancellor who is really the judge.(*i*) Nor can the auditor be allowed to act, in any manner, as a prying, pragmatical agent, hunting up and collecting the means of making or sustaining any claim, or objection in relation to the matter in controversy. It is his duty to confine himself strictly to that which appears upon the face of the proceedings and proofs, and to abstain from suggesting any objection, prejudicial to any party, which the court, in its regular course, would not, of itself, notice and sustain, if founded in fact. It is his duty to examine and digest accounts; to prepare the

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May next. 10th December 1792; no cause having been shewn the sale was absolutely ratified.

11*th December*, 1792.—Hanson, *Chancellor*.—Each of the creditors of James Conner deceased, mentioned in the report of the auditor, is entitled, not only to the sum set down opposite to his name out of the principal money due, or paid by the purchasers of Conner's real estate, but likewise to his just proportion, or dividend of the interest paid, or to be paid on the sum of £112 19*s*. 1½*d*, which appears, from the said report, to be the net product of the sale.

The decree directs the money arising from the sale to be brought into court. But if the trustee shall pay to each of the creditors aforesaid, that which he is entitled to, and take his receipt in full, he will probably run no risk of being sued on his bond.

For illustration. N. Latcham appears, from the report aforesaid, entitled to the sum of £6 5*s*. 1*d*. out of the sum of £112 19*s*. 1½*d*. He is likewise entitled to his dividend of the interest, which the trustee shall receive on the said £112 19*s*. 1½*d*. Suppose two years interest to be paid on the said £112 19*s*. 1½*d*. This will be about £13 11*s*. 0*d*. Then as £112 19*s*. 1½*d*. is to £13 11*s*. 0*d*. so is the sum of £6 5*s*. 1*d*. to the additional sum which the said Latcham will be entitled to. So of the rest.

(*h*) Moore *v.* Aylet, 2 Dick. 641.—(*i*) Field *v.* Holland, 6 Cran. 21; Dick *v.* Milligan, 2 Ves. jun. 24.

materials on which a decree or final disposition of the case may be made; and to report the result of his examinations, subject to all exceptions of the parties, and to the further order of the Chancellor. On a consideration of this case it does not appear, that the auditor has in any respect departed from the proper line of his duty.(*j*)

According to the long established practice in creditors' suits it has been most usual, and particularly so of late years, to order the case to the auditor, or rather for the trustee or a party interested to take it to him, after the time allowed to other creditors to exhibit their claims has elapsed, and have an account stated and reported. It is true, that the court may be called upon, in the first instance, to decide upon all or any one of the claims, which have been exhibited. This course is now, however, rarely or never taken, unless when there is supposed to exist some very unusual difficulty. When the case goes to the auditor, without any previous instructions from the court, he admits into his account every claim that has been filed and properly authenticated, with all others which there is any plausible reason to believe may be, in any way, sustained by proof and allowed.(*k*)

In making distribution of the proceeds of a deceased debtor's real estate among his creditors, this court is directed by an act of assembly,(*l*) (which in this respect is not at all affected by the testamentary system,)(*m*) to pay away the proceeds of the realty in the same *order*, that is to be observed by an executor or administrator in making payments out of the personalty.

It has always been the practice in this court to require all claims to be proved before they are allowed either for the whole or admitted to a dividend, in the same manner as they would be required to be authenticated in order to be passed by an Orphans Court; and therefore no claim, coming in under a creditors' bill, will be passed or allowed, which could not, according to law, be passed and allowed against the personal estate by an Orphans Court. This was the practice long before the passage of the general testamentary act;(*n*) and has continued to be so ever since.

It has also been always a settled rule of this court, and is one which has been affirmed by the Court of Appeals, that a judgment against an executor or administrator is of no avail against the

(*j*) Le Sage *v.* Coussmaker, 1 Esp. Rep. 187; Field *v.* Holland, 6 Cran. 21. (*k*) Field *v.* Holland, 6 Cran. 26.—(*l*) 1785, ch. 80, s. 7.—(*m*) 1798, ch. 101.—(*n*) 1798, ch. 101.

heirs of the deceased debtor; not even so far as to prevent the operation of the statute of limitations.(*o*) Therefore these judgments which have been obtained against the executor, cannot relieve these creditors from the necessity of producing the usual proofs of their claims. Their original causes of action, as they stood before these judgments were rendered, must be proved as against these heirs precisely as if no such judgments had ever been obtained.

And generally in other respects all claims must appear upon the face of them, *prima facie*, to be just and fair; and to have obtained or had assured to them, at the instance of the creditor, payment from no other person or fund. Unless a claim is thus authenticated, and upon the face of it clear, it will not be allowed, even although no objection should be made to it by any one interested. And consequently it has always been considered to be the duty of the auditor to notice, in his report, all objections of this description. The auditor has no right certainly to moot cases to the court; or to make any objections, such as the statute of limitations, or the like, which can only come with propriety from a party interested, and which, therefore, if made by the auditor alone, will be disregarded.

But, notwithstanding a claim may have been formally vouched and reported as clear of all apparent objections, yet any party interested, a defendant or a co-creditor, may deny its existence and oppose its allowance altogether, in which case it must be regularly and legally established, as upon an issue joined in a court of law.

It has been found in practice, that there are several important advantages in sending the case at once to the auditor, and having an account stated. The claimants are immediately apprised of what is wanted, if any thing, to sustain their claims: those against which there is no objection may obtain satisfaction, or at least a dividend without further delay. The heirs and each creditor are informed of the nature of the distribution proposed to be made. Each claim is presented in a clear and distinct point of view. The debatable ground is designated, its extent reduced, and the progress of the cause accelerated.

The objection, that these claims No. 3, 4, and 5, are each of them founded on such a judgment against the executor as carries in itself conclusive evidence of a sufficiency of personal assets to

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(*o*) Harwood *v.* Rawlings, 4 H. & J. 126; Duvall *v.* Green, 4 H. & J. 270; Mason *v.* Peter, 1 Mun. 437.

satisfy them, goes to their merits, and unless clearly obviated, they must be rejected. These claimants do not allege, that it will be in their power to remove this objection, by any means whatever, but rest their case entirely upon the fact of its having no foundation in equity. It is certain, that an absolute judgment, obtained without mistake or fraud, is conclusive evidence of a sufficiency of assets in the hands of the executor to satisfy such judgment.(*p*) The admission of the defendants in this case of the insufficiency of the personal estate was made with reference to none other than the claim of the originally suing creditor by whom it was called for. Now it may be perfectly true, that the executor has actually reserved assets to pay claims No. 3, 4, and 5; and, yet no less true, that he has nothing left to meet the claim of this plaintiff.

There is then nothing in this objection of the auditor incompatible with the previous proceedings or acts of the court; or which, as has been urged, militates against the decree which was grounded upon an alleged and admitted insufficiency of personal estate to satisfy the claim of the plaintiff; for these claims No. 3, 4, and 5, were not then before the court.

But it is said to be an established principle of this court, that where it appears, upon the face of the voucher, that the creditor may or can obtain payment, by pursuing another and more proper person or fund, he shall not be permitted to come here, and partake of the realty to the prejudice of the heir or of other creditors. It is upon this ground, that an obligee is turned aside to seek payment of the whole or a proportion from a principal, or a co-surety who is solvent. These creditors have established their claims as against the personalty, or natural fund, of the sufficiency of which to satisfy them, their judgments afford conclusive evidence. If they now leave it and obtain satisfaction from the realty, what is to become of the amount of personalty which their judgments prove to exist in the hands of the executors? Is the executor to be suffered to retain it, or is the heir to be allowed, upon the principle of substitution, to obtain it? But the demand of a creditor upon the heir is always and must necessarily be founded upon the fact, that the personalty is not sufficient to satisfy the claim. These considerations have convinced me, that the auditor's objection is correct, and that these

(*p*) Wheatly *v.* Lane, 1 Saund. 219 n. 8; Skelton *v.* Hawling, 1 Wils. 258; Suffolk *v.* Harding, 3 Rep. Chan. 88; Ramsden *v.* Jackson, 1 Atk. 292; Greerside *v.* Benson, 3 Atk. 248; Robinson *v.* Bell, 2 Vern. 146; Ruggles *v.* Sherman, 14 John. 446; Giles *v.* Perryman, 1 H. & G. 168; Gaither *v.* Welch, 3 G & J. 259.

claims No. 3, 4, and 5, ought not to be allowed to partake of the proceeds of the realty.

Whereupon it is *ordered*, that the said claims, designated by the auditor as No. 3, 4, and 5, be and the same are hereby rejected. And the auditor is directed to re-state the account accordingly.

George Barber, whose claim had been stated as No. 3, and Charles Waters, whose claim had been stated as No. 4 and 5, filed their several petitions, on the 7th of July 1828, without oath, in which they alike state, that it was in their power to show, by evidence not now in the proceedings, that the personal estate of the deceased had been exhausted in the payment of other just debts; that the executor was insolvent; and that his sureties might be relieved in equity. Whereupon they prayed, that they might be allowed to adduce further proof, and that the order of the 22d of March might be rescinded, &c.

8th July, 1828.—Bland, *Chancellor*.—These petitions do not allege, that there is any error apparent upon the face of the decision of the court; nor do they set forth and aver, that the petitioners have discovered any new testimony, not known to them at the time the opinion of the court was delivered; consequently, independently of the want of any affidavit to their petitions, they have laid no foundation for a bill of review, even if they had asked leave to file such a bill; or this were a case in which such a form of proceeding, or something equivalent to it, would be proper. Nor is it stated in these petitions, that there has been any mistake, oversight, or misapprehension in the judgment pronounced; therefore there is no ground for a re-hearing.

But these claimants, after having had a formal hearing of their case, upon all such facts and circumstances as they then deemed pertinent or necessary; and, after having submitted it for a decision; and, after their claims had been rejected, upon the ground of that very objection of which they had full and timely notice, now ask to have the order so passed, rescinded for the purpose of allowing them to introduce other proofs, not now in the proceedings, to remove those objections, and in fact to give to their case an entirely different complexion.

If such a course could be tolerated, under any circumstances, there would be no stability in any decision whatever; for, there is no case in which the parties might not have some pretext for introducing additional proof, of one kind or other, to vary the case in

some way, after the reasons and grounds of the judgment of the court had been fully explained and made known. Instead of the parties being obliged to bring all the facts and circumstances of their case at once before the court, they would be continually tempted to withhold some particulars, expressly with a view to have it reconsidered and amended in those points where they saw, from the opinion of the court, that the law pressed most against them. Such a course of proceeding would open a door to the greatest frauds, and could not but be attended with the most grievous expense and delay. Therefore as these claims have been adjudicated upon, in the manner and upon the grounds on which they had been advisedly and deliberately presented for decision, I deem it improper now to suffer them to be again brought before the court in a new shape, on different principles, and other proofs.

Whereupon it is ordered, that these petitions be and the same are hereby dismissed with costs.

From this order as well as that of the 22d of March there was an appeal, and on the 6th December 1831 the appeals were dismissed with costs.

FENWICK *v.* LAUGHLIN.

Where, on a bill by a mortgagee against the heirs of a deceased mortgagor, the mortgaged estate had been sold to pay the mortgage debt, leaving a surplus; other creditors of the deceased were allowed to come in, on the ground of the insufficiency of the deceased's personal estate; considering the surplus as a *residuum* of the real assets which had been taken from the hands of the heirs; and to have the case thenceforth considered and treated as a creditors' suit.

This bill was filed, on the 20th of April, 1827, by *Martin Fenwick* and *Francis Bird*, against *William Laughlin* and *Jonathan Hawkins*, to foreclose a mortgage of real estate given by the late *Jonathan N. Laughlin*, the ancestor of the defendants, to the plaintiffs. The defendants put in their answers, admitting the facts as stated in the bill; upon which, on the 22d of May, 1827, it was decreed, that the mortgaged property be sold. And the trustee having reported, that he had made a sale accordingly, it was ordered as usual, that the sale be ratified unless cause be shewn. And no cause being shewn, the sale was finally ratified on the 9th of July 1828.

On the 13th of March 1828, *Isaac Owens*, *Benjamin Wells*, and *Martin Fenwick*, on behalf of themselves and the other creditors of the late *Jonathan N. Laughlin*, filed their petition in this case, in which they stated, that the deceased was indebted to *Owens* in the sum of $95 60; to *Wells* in the sum of $55 84, and to *Fenwick* in the sum of $45 50. That the personal estate of the deceased was totally insufficient to pay his debts; and that the proceeds of the sale of his mortgaged real estate, sold under the decree in this case, was more than sufficient for the payment of the mortgage debt. Whereupon they prayed, that they, with the other creditors of the deceased, might be paid out of this surplus, &c.

14th March, 1828.—Bland, *Chancellor*.—Where a bill has been filed against the heirs of a deceased mortgagor to obtain payment by a sale of the mortgaged property;(*a*) or where a bill has been filed to obtain a partition of an intestate's real estate among his heirs;(*b*) or where a deceased debtor's real estate has been

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(*a*) O'Brian *v.* Bennett, *ante*, 86; Latimer *v.* Hanson, *ante*, 51.

(*b*) Spurrier *v.* Spurrier.—This petition, filed on the 21st of September 1810, states, that the late John Spurrier died intestate seized of a valuable real estate, which would not admit of division among his widow and children, some of whom were married and others infants, who are his heirs: all of whom are parties to this suit. Prayer, that the real estate may be sold and the proceeds divided. The answers admit these facts. Whereupon it was, on the 15th of March 1811, decreed, in the usual form, that the lands be sold, and they were sold accordingly.

After which Henry McCoy by petition stated, that the late John Spurrier was considerably indebted to him; that his real estate had been thus sold; and that his personal estate was insufficient to pay his debts. Prayer, that an order may pass notifying the creditors to exhibit their claims; and that his claim may be paid, &c.

18th September, 1811.—Kilty, *Chancellor*.—The trustee, for the sale of the real estate of John Spurrier deceased, is desired to give notice to the creditors to exhibit their claims in the chancery office before the first day of December next, by advertisement inserted three weeks in the American.

Henry McCoy by another petition stated, that his claim had been passed by the auditor and the Orphans Court; that the sales amounted to upwards of $20,000, and the claims to not more than about $11,000; that he was tenant to the purchaser, at the annual rent of $1450; and he therefore prayed that his claim might be discounted through the purchaser his landlord.

23d March, 1812.—Kilty, *Chancellor*.—The Chancellor cannot direct the payment or discount of any claim before the ratification of the sale; and in order to its being made it is necessary to prove the publication of the conditional order of ratification passed September 9th 1811, which may be done by the certificate of the printer or the production of the newspapers. It is necessary also to produce the like proof of the publication of the order of September 18th 1811, on the petition of Henry McCoy for the creditors to exhibit their claims.

Archibald Dorsey by petition stated, that he was a creditor of the deceased, and

decreed to be sold in any other manner than by a creditors' bill: any creditor of such deceased person may be permitted to come

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that his claim had been objected to, whereupon he prayed, that he might be heard on a day to be appointed.

25th May, 1812.—KILTY, *Chancellor*.—On the above application the following order is passed, which the register is desired to have published this week in the Maryland Republican:—In Chancery, May 25th, 1812. Ordered, that the claims against the real estate of John Spurrier deceased, to which exceptions have been filed, will be decided on, on the 1st day of June next.

The auditor reported, that he had in obedience to the order of the Chancellor stated an account of the claims against the estate of the deceased.

22d July 1812.—KILTY, *Chancellor*.—Ordered, that the statement of the claims as reported by the auditor be confirmed. The commissions are not yet fixed, and therefore the usual account with the trustee cannot be stated. But the trustee is authorized and directed to settle with the said claimants by payment when the proceeds of the sales are received, or by discount, or assignment, if agreed to by any of them; the amount of the sales being more than that of the claims, and leaving a sufficiency for the commissions and costs and the claims which are suspended.

Roderick Warfield by petition, filed 30th September 1812, stated, that in the lifetime of the intestate he had married Henrietta one of his daughters; that the trustee, on the 22d day of June 1811, sold the greater part of the real estate of the intestate; and on the 14th day of November 1811 sold the residue; that the whole purchase money was, or would shortly be in possession of the trustee; that his wife Henrietta died on the 9th day of July 1811, after having had a child born alive during the marriage; that the trustee refuses to pay to him his proportion of the estate to which his wife was entitled. Prayer to take testimony to substantiate these facts; that the trustee be ordered to pay over to him such proportion as he is entitled to receive of the proceeds of the real estate; and for such other relief, &c.

1st October, 1812.—KILTY, *Chancellor*.—On the above application it is ordered, that depositions in Ann Arundel county, taken on three days' notice to the trustee or to the petitioner, be received in evidence on the hearing.

Anne Spurrier by petition stated, that she was the widow of the intestate; that there was a large surplus to be distributed among the heirs of the deceased, four of whom are minors, who reside with her, as their mother and natural guardian; that she is unable to maintain them; and is willing to give bond, as guardian, for any share which may be ordered to be paid to her for them. Prayer that the surplus may be distributed; and that the shares of the minors be paid to her.

28th January, 1813.—KILTY, *Chancellor*.—On the application of the heirs for a distribution of the proceeds, it is *ordered*, that the claims be reported by the auditor on the 10th day of March next on the proof then exhibited, for the final decision of the court, when the petition of Roderick Warfield will also be acted on. A copy of this order to be inserted three weeks in the Maryland Republican.

On the 10th March 1813, the auditor reported, that at the request of the trustee, and in obedience to the Chancellor's order of the 28th January 1813, he had stated all the claims exhibited since the last report of the late auditor. And among other things he says, "The claim No. 37 appears to be a judgment in favour of Thomas

in by petition, and have his claim allowed and paid out of the whole or the surplus of the proceeds of the realty of the deceased

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Cumming on the joint and several bond of the deceased and one John Cumming, and at the request of the trustee the auditor has stated, as part of the claim, the costs of the deceased as defendant as well as the plaintiff's costs, the whole amount as stated having been paid by the said trustee; and the said whole amount so stated is admitted in writing to be a just claim against the deceased's estate by his eldest son, who admits also that the other obligor John Cumming is insolvent. The said claim is moreover accompanied by a certificate of John Purviance esq'r, as counsel for the plaintiff, that no part thereof has been received, except what is credited. No authentic certificate, however, is produced of the said John Cumming's discharge under the insolvent law; supposing him to be the principal in the bond on which the judgment was rendered. No proof that the said John Cumming was security only. And no affidavit, that the said judgment has been fully discharged.

13*th March*, 1813.—KILTY, *Chancellor*.—Considering the report and statements by the auditor and the evidence adduced, it is ordered, that all the claims, as stated, be allowed; except the last, being the claim of T. Watkins, which is rejected. The auditor, in stating the account with the trustee, will allot a share to Roderick Warfield, which will be subject to the order of the Chancellor on a further consideration of his petition, and the arguments in writing urged against it.

After which the case was again submitted, at the instance of the widow to obtain a portion of the proceeds of sale in lieu of dower.

14*th September*, 1813.—KILTY, *Chancellor*.—The widow Ann Spurrier is allowed, (her age being proved) one eighth part of the net proceeds of the land sold to G. Calvert and also of the small tract sold to William C. Spurrier. The claim No. 25 having been paid, according to the former order before that of May 26th 1813, is confirmed. . The claim No. 24 is rejected. A distribution of the balance to be made as follows:—The same to be divided into eight parts, one of which is to be reserved for the decision of the claim of Roderick Warfield. The amount of the other seven parts to be equally divided between John and Ann Cumming, William C. Spurrier, John Spurrier, Eliza Spurrier, Richard Spurrier, and Horace Spurrier, Lewis being stated to have died since the sale, and since the death of Henrietta Warfield. The payment of the shares of John Spurrier, Eliza Spurrier, Richard Spurrier, and Horace Spurrier, who are minors, to be made to their mother Ann Spurrier the petitioner, on the approval by the Chancellor of a bond to be filed by her with two sufficient sureties with condition similar to that in guardians' bonds, but reciting the sale, &c. under the decree of this court; and not before. Interest to be paid on the shares in proportion as it has been, or may be received. The petition of Roderick Warfield will be taken up this month on the application of either party.

Proofs having been collected under the order of the 1st of October 1812, to establish the facts set forth in the petition; it appears by the notes of Mr. A. C. Magruder, submitted in opposition to the prayer of this petition, that he insisted, that the husband could at most be considered only as a tenant by the courtesy; especially for that part which had been sold after the death of the wife; that, even if it were to be considered as her money, yet it was a mere equitable title which the husband could not reduce into possession without making a proper settlement. (1 *Ves.* 538, 3 *P. Will.* 13.) But, that, in this case, the proceeds must be regarded as land, and pass as the real estate would have passed had the sales not been made; and it had been so held, after much consideration, by the county court of Prince George's in

so far as they will go; considering the surplus as a *residuum* of the real assets which had been taken from the hands of the heirs. But such petitioning creditor will be required to establish his claim; to show, by the usual proofs or admissions of the party, the insufficiency of the personal estate of the deceased to pay his debts; to notify his heirs, that they may have an opportunity of contesting the allegations of the petitioner, and the justice of his claim or that of any other creditor who may afterwards come in, as is allowed on a creditors' bill, by merely filing the voucher of his claim; and also, he or the trustee to give notice in the usual way, to the creditors to bring in their claims.

Whereupon it is ordered, that the surplus of the proceeds of the sale of the said mortgaged estate be applied to the satisfaction of the debts of the said *Jonathan N. Laughlin* deceased, unless good cause be shewn to the contrary on the second day of June next. Provided a copy of this order, together with a copy of the said petition, be served on the said defendants on or before the 12th day of April next. And it is further ordered, that the said trustee, by publication to be inserted in some newspaper, twice a week for three successive weeks before the twelfth day of April next, give notice to the creditors of the said late *Jonathan N. Laughlin* to file the vouchers of their claims in the chancery office, on or before the second day of June next.

After which, upon the usual proof and certificate that notice had been given, and publication made as required by this order, the matter was submitted.

9th July, 1828.—Bland, *Chancellor.*—*Ordered*, that the matter of the said petition be, and the same is hereby taken *pro confesso;* no cause having been shewn, although notice has been given as

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a similar case; and the husband was required to give good security, (considering him as tenant by the courtesy,) that her children should have the money after his death.

29th November, 1813.—Kilty, *Chancellor.*—On the within petition notes have been filed by the counsel on behalf of the heirs, and it has been submitted on the part of the petitioner. The original bill or petition appears to have been filed under the 12th section of the act of 1785, ch. 72, the intention of which appears to have been to turn the land into money for the purpose of division. Which sale the court is not bound to order unless for the interest and advantage of all parties. And the practice has been, as far as the Chancellor has been informed, to divide the proceeds as personal estate. And the acts respecting widows entitled to dower, and tenants by the courtesy, are in the same spirit. It is therefore, ordered, that the part allotted by the auditor to Roderick Warfield the petitioner, and hitherto reserved, be paid to him in the manner directed as to the others. (*Jones v. Jones, ante*, 443.)

ordered. And it is further ordered, that this case be and the same is hereby referred to the auditor with directions to state an account accordingly.

In obedience to this order the auditor reported a distribution of the surplus of the proceeds among twelve of the creditors of the deceased, nine of whom had come in under the order of the 14th of March; which distribution of the auditor was confirmed, and the trustee directed to apply the proceeds accordingly, on the 28th of August 1828, and the whole case so finally closed.

FORNSHILL *v.* MURRAY.

The contract of marriage is the parent, not the child of civil society. If valid where celebrated, it is valid every where. It cannot be cast off at the pleasure of the parties. It must here be solemnized in the face of a church or with the blessing of a clergyman. General reputation, or proof of cohabitation as husband and wife, is, in general, sufficient evidence of a contract of marriage.

The county courts may inquire into the validity of certain marriages.

The Court of Chancery may award alimony; and it may also declare a marriage to be void which has been procured by abduction, terror, and fraud.

No judicial proceeding can be had after the death of either party for the purpose of having their marriage declared void, or of bastardizing any one after his death. But where the validity of an alleged marriage, or the legitimacy of any one forms a necessary link in the chain of title to the property in question, there such validity or legitimacy may be inquired into and determined, either by a court of law, or of equity. It is not indispensably necessary in any case to make up an issue to have the facts ascertained by a jury.

This bill was filed on the 31st of January 1827, by *John Fornshill* and *Ann* his wife, *Alexander M. Williams* and *Sarah* his wife, *Andrew Fulton*, and *William Fulton* an infant by *Andrew* his next friend, against *William V. Murray* surviving administrator *de bonis non* of *Henry Somervell*, and *William Hubbard* administrator of *Thomas Somervell*.

The bill states, that *Mary*, the sister of *Henry*, by her first marriage with *Andrew Davidson* had issue the plaintiffs *Ann* and *Sarah*, and by her second marriage with *William Fulton* had issue the plaintiffs *Andrew* and *William;* that she died leaving these four children; that, some time after her death, *Henry* died intestate without leaving a widow or any children, or the descendant of any

children; that he left a large personal estate, upon which letters of administration were granted to *James Chapline*, who died soon after, upon which administration *de bonis non* was granted to *Thomas Lookerman* and the defendant *Murray*, soon after which *Lookerman* died; that some time after the death of the intestate *Henry*, his brother *Thomas* died intestate, and letters of administration upon his estate were granted to the defendant *Hubbard;* and that the intestate *Henry* left no other next of kin at the time of his death, than the plaintiffs, and his brother *Thomas;* whereupon the plaintiffs prayed, that the defendant *Murray* might be decreed to account, and to pay to them their distributive shares of their late uncle *Henry Somervell's* estate, &c.

To this bill the defendants put in a joint and separate answer, in which they admitted that *Mary*, the mother of the plaintiffs, had issue and died as stated; that the intestate *Henry* left a considerable personal estate; and also that their intestates died, and administration had been granted as set forth. But they alleged, that the intestate *Henry* left other next of kin beside those mentioned in the bill, and that *Mary* the mother of the plaintiffs, who was a sister of the half-blood of the intestate *Henry*, had been first lawfully married in Ireland about the year 1789, to *John Lewis*, who was still alive and had always resided there; and that she, after having cohabited with him for some time as his wife, left him about the year 1792 and came to Maryland, where she continually resided until her death, leaving her lawful husband *John Lewis* then and still living. Whereupon the defendants averred, that the alleged subsequent marriages of *Mary* with *Davidson* and with *Fulton* were utterly void; and that the plaintiffs, *Ann*, *Sarah*, *Andrew*, and *William*, were illegitimate; and, as such, absolutely incompetent legally to demand any thing as the next of kin of *Henry Somervell*.

A commission was issued to Ireland, and the depositions of several witnesses were taken and returned; from which it appeared, by the testimony of two witnesses who were present at the marriage ceremony, that *Mary*, the sister of the intestate *Henry*, had been married to *John Lewis*, who was then living; and that they had afterwards cohabited, as husband and wife, for about two years; when she left him, and, as they had always understood, went from Ireland to America. The testimony of these two witnesses was corroborated by that of others, who declared, that they knew the intestate *Henry's* sister *Mary* and *John Lewis* to have lived together some time, as husband and wife; and that they were so

reputed to be in the neighbourhood in which they lived; and that *Mary* left her husband *John Lewis* and migrated to America about the year 1792, where, as they had heard, she had continually resided until her death; and that *John Lewis* does now, and always has resided in Ireland. In addition to which the deposition of an attorney was taken, who testified, that such a marriage, as that described by the other witnesses, was valid according to the law of Ireland; and, that he had known such marriages to be held valid in the courts of justice there.

12*th July*, 1828.—Bland, *Chancellor*.—This case standing ready for hearing, and having been submitted without argument, the proceedings were read and considered.

Marriage has been considered among all nations as the most important contract into which individuals can enter, as the parent not the child of civil society.(*a*) It would seem, that in the dark ages a notion prevailed of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil character; by which notion, some were carried so far as to say, that a marriage of an insane person could not be invalidated on that account. In more modern times, it has been considered in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons.(*b*) It has been, most commonly, every where celebrated by some religious solemnities; and, from its nature and objects, has been held to be obligatory during the joint lives of the parties, without the power of being thrown off at the pleasure of either or both of them;(*c*) except perhaps in the single instance, according to the ancient and now obsolete law, where the husband or wife with the consent of the other, became a monk or nun professed, whereby the contract of marriage was virtually dissolved.(*d*)

According to the law of England, a contract of marriage is not deemed complete, so as to entitle the wife to dower, and the issue to inherit, unless it be celebrated in the face of the church, or with the blessing of a priest.(*e*) In Scotland no religious ceremony is necessary to constitute a legal marriage;(*f*) and in Eng-

(*a*) Dalrymple *v.* Dalrymple, 2 Hag. Con. Rep. 54.—(*b*) Turner *v.* Meyers, 1 Hag. Con. Rep. 414; Browning *v.* Reane, 2 Phill. Rep. 69; Shelf. Lun. 59, 446; Portsmouth *v.* Portsmouth, 1 Hag. Rep. 355.—(*c*) Gordon *v.* Pye, Fergusson's Rep. Append. note A. 349; Westmeath *v.* Westmeath, 1 Jac. Rep. 138.—(*d*) Co. Litt. 132. (*e*) Dalrymple *v.* Dalrymple, 2 Hag. Con. Rep. 54.—(*f*) Dalrymple *v.* Dalrymple, 2 Hag. Con. Rep. 54.

land, during the time of the Commonwealth, marriage was allowed to be contracted before a justice of the peace.(*g*) In Maryland there was a time when marriage might have been legally contracted before a county court or in presence of a magistrate;(*h*) but other provisions having been made upon the subject by the legislature of the Province,(*i*) and by the General Assembly of the State,(*j*) it would now seem to be certainly the most correct, if not the only legal mode of contracting marriage, here as in England, by having it celebrated in the face of some church, or with the blessing of a clergyman.

In general it is sufficient to show, that a man and woman have cohabited as husband and wife; have represented themselves as such; or have been reputed in the neighbourhood of their residence to have been legally married, to establish the fact of their marriage and the legitimacy of their children. The only exceptions to this rule are the cases of a prosecution for bigamy, and an action of *criminal conversation*, in each of which, proof of an actual marriage is necessary. For although the action of *crim. con.* is, in its form, properly a civil action, yet it is in the nature of a criminal prosecution; and if proof of cohabitation or reputation were received as alone sufficient evidence of the marriage, it would place it in the power of the parties to collude together and pass themselves off as husband and wife occasionally for the express purpose of profiting by such a suit.(*k*) But although, in such cases, the mere general reputation of a marriage may not be deemed sufficient, yet it appears, that the deliberate admission of the defendant in an action of *crim. con.*, that the woman was the wife of the plaintiff; or the confession of the accused of the fact of the first marriage in a prosecution for bigamy, will even in those cases be received as sufficient to establish the fact of the marriage.(*l*)

In England the spiritual court has jurisdiction to inquire into the validity of a contract of marriage; and may, in certain cases, determine, that it is wholly void, or decree, that it be dissolved, and that the parties be divorced; but in all cases not falling within the jurisdiction of the ecclesiastical courts the parliament alone can grant relief.(*m*) In Maryland, there never having been an ecclesiastical court, and no power to grant a divorce, by annul-

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(*g*) 4 Bac. Abr. 531, 536.—(*h*) 1702, ch. 1, s. 4; 1715, ch. 44, s. 25.—(*i*) 1717, ch. 15.—(*j*) February 1777, ch. 12.—(*k*) Morris *v.* Miller, 4 Burr. 2057; Birt *v.* Barlow, Doug. 171.—(*l*) Stark. Evi. 4 pt. 36 & 1185.—(*m*) 4 Bac. Abr. 554.

ling, for any cause, a contract of marriage which was originally valid, ever having been conferred upon any of the courts of justice, it follows, that a divorce can only be granted by an act of the General Assembly.(*n*) But all questions concerning alimony, even under the provincial government, were considered as having devolved upon the Court of Chancery. It was however provided,(*o*) that the general court should have power, on an indictment or by petition of either party, to inquire into the *validity* of any marriage, and might declare any marriage, contrary to the marriage act, or any second marriage, the first subsisting, null and void. This law, as it would seem, may now, since the abolition of the general court, on proper application, be executed by a county court. This court has been clothed with no such authority to determine the validity of a contract of marriage; but, by virtue of its general jurisdiction in matters of fraud affecting contracts, it would seem, that, considering marriage as a mere civil contract, it may, at the instance of either party, declare a marriage to be null and void, which has been procured by abduction, terror and fraud.(*p*)

In England, the validity of a marriage which is not absolutely *void* but merely *voidable*, can only be drawn in question and determined, in a suit instituted for that purpose, in the ecclesiastical court. But, as by the death of the husband, or the wife, the marriage is at an end, so any then depending suit, which may have been instituted during their lives for that purpose, is thereby immediately abated, and cannot be, in any way, revived or further prosecuted; nor can any other judicial proceeding be thereafter instituted, in the ecclesiastical courts or elsewhere, for the purpose of declaring a marriage, which has been thus terminated by the death of either party, to have been null and void, for the purpose of bastardizing the issue of such marriage, or barring the husband of his courtesy, or the widow of her dower; nor can any one, by any judicial proceeding be bastardized after his death, who had carried the reputation of legitimate during his life; because wrongs, and personal defects die with the individual; and the peace of families and the nature of the testimony by which alone pedigrees are capable of being traced, in cases where a party makes title by

(*n*) Utterson *v.* Tewsh, Fergusson's Rep. 23; Mrs. Levett's Case, Ferg. Rep. appen. note G. 382.—(*o*) February 1777, ch. 12, s. 15.—(*p*) Portsmouth *v.* Ports mouth, 1 Hag. Rep. 355; In matter of Fust, 1 Cox. 418; *Ex parte* Turing, 1 Ves. & Bea. 140; Ferlat *v.* Gojon, 1 Hopk. 478.

descent, require that there should be a limitation beyond which the institution of any judicial proceeding for the purpose of trying the validity of any marriage or the legitimacy of any person ought not to be allowed.(*q*) If these principles be correct, and as entirely applicable here, under different forms of judicial proceeding, as in England, it follows, that there can now, after the death of *Mary*, be no judicial proceeding had to declare her second and third marriages, with *Davidson* and with *Fulton*, void for the purpose of bastardizing her issue by either of them.

But the issue of *Mary* by her second and third marriages, which were absolutely *void*, not merely *voidable*, are here claiming as parties to this suit; and found their title to recover materially and essentially upon the validity of those marriages, and their own legitimacy as the fruit of them. In all such cases, where a party claims as heir or next of kin, and his own legitimacy, or that of the deceased under whom he claims, is thus necessarily involved, and put in issue, it never has been questioned, that the court might inquire into and decide upon the validity of the marriage, or the fact of legitimacy. This has been often done in England,(*r*) and has also been allowed by the courts of this state;(*s*) because, wherever the validity of a marriage or the legitimacy of a party forms a component part of the matter in controversy, it becomes indispensably necessary, that the court should inquire into and determine upon that fact, as well as every other part of the case; for otherwise it would be to suppose a suit brought before a court, which had not a capacity to try the cause of action.(*t*) And upon that ground, although it is perfectly well settled, that the Court of Chancery has no criminal jurisdiction whatever, and is in its institution and forms of procedure absolutely civil, yet if a bill be filed in it for the purpose of setting aside a deed or to be relieved against a will on the ground of fraud, the instrument complained of may be shewn to be a forgery: and the fact of forgery may, when thus incidentally involved, be determined and relief given, founded upon a criminal fact, although it would be altogether improper for it *directly* to decide upon any such question upon a criminal charge.(*u*)

(*q*) Co. Litt. 33; 1 Hall. Const. Hist. Eng. 395; Kenn's case, 7 Co. 142; Hinks *v.* Harris, 4 Mod. 182; Hemming *v.* Price, 12 Mod. 432; Haydon *v.* Gould, 1 Salk. 119; Brownsword *v.* Edwards, 2 Ves. 245; Elliott *v.* Gurr, 2 Phill. 16.—(*r*) Alleyne *v.* Grey, 2 Salk. 437; Mâce *v.* Cadell, Cowp. 233; Stark. Evi. 4 pt. 218, 931.—(*s*) Cheseldine *v.* Brewer, 1 H. & McH. 152; Ferlat *v.* Gojon, 1 Hop. 494.—(*t*) 1 Bac. Abr. 571. (*u*) Barnesly *v.* Powel, 1 Ves. 120, 287; Stace *v.* Mabbot, 2 Ves. 553; Duntze *v.* Levett, Fergusson's Rep. 63; Stark. Ev. 4 pt. 931; Peake *v.* Highfield, 1 Russ. 560.

It appears, that the first marriage of *Mary* with *John Lewis* was legally had and solemnized in Ireland; hence, according to the law of nations, it must be held to be a valid marriage here; for otherwise the rights of mankind would, in this respect, be in a most precarious and uncertain condition.(*v*) And consequently the subsequent marriages of *Mary* in Maryland with *Davidson*, and after his death with *Fulton*, while her husband *John Lewis* was alive, must be considered as utterly void.

When a question of legitimacy becomes thus involved in a controversy in a court of chancery, it is said to be usual to make up an issue, and have the matter tried by a jury who are the proper judges of fact.(*w*) But it is not indispensably necessary, in any case, that the Chancellor should have any fact determined by a jury. It is only when he entertains a reasonable doubt as to the fact, and when it depends on evidence the weight of which can be better estimated by a jury, or where the testimony is very obscure and contradictory, if he thinks fit that the Chancellor, for the information of his own conscience, may have recourse to this auxiliary mode of obtaining it.(*x*) But in this case the proof is so clear and demonstrative, that there is not the smallest room for a doubt upon the subject; therefore I hold it to be my duty to pronounce an immediate decree.

The proofs clearly establish the fact, that the late *Mary*, the mother of the plaintiffs, had been, long previously to their birth, legally married, and was then the lawful wife of a certain *John Lewis*, who at the time of the marriage, and continually ever since, has resided, and is now living in Ireland. And consequently these plaintiffs, who were all born in Maryland many years after their mother came to and resided in this state, are all of them illegitimate; and, as such, they cannot take as her legal representatives, or as the next of kin of the late *Henry Somervell*. The act of 1825, ch. 156, has no retrospective operation, and therefore cannot affect this case.

Whereupon it is *Decreed*, that the bill of complaint be dismissed with costs to be taxed by the register.

(*v*) Roach *v.* Garvan. 1 Ves. 159; Herbert *v.* Herbert, 3 Phill. 58; Duntze *v.* Levett, Ferg. Rep. 63; Edmonstone *v.* Lockhart, Ferg. Rep. 168; Butler *v.* Forbes, Ferg. Rep. 209; Herbert *v.* Herbert, 2 Hag. Cons. Rep. 263; Ruding *v.* Smith, 2 Hag. Cons. Rep. 371.—(*w*) Revel *v.* Fox, 2 Ves. 270; Read *v.* Passer, 1 Esp. Rep. 213. (*x*) Short *v.* Lee, 2 Jac. & Walk. 496; Peake *v.* Highfield, 1 Russ. 560.

ESTEP *v.* WATKINS.

A purchased of B a tract of land, the legal title to be conveyed when the purchase money was paid; for which he gave his bond: after which B died, and his widow had her dower in the land. *Held*, that A was entitled to a deduction from his bond to the amount of the value of the widow's dower.

When a case is set down for final hearing on bill and answer, without replication, all the facts set forth in the answer are taken to be true.

Every decree stands for what it purports to be until regularly revised or reversed.

The case, as set forth in the bill, must, at the final hearing, appear to be such an one as falls within the jurisdiction of a court of chancery.

The assignee of a bond takes it subject to all equities, whether he has notice of them or not.

This bill was filed on the 21st of December 1827, by *Rezin Estep*, against *Rachel H. Watkins*, *Benjamin Watkins*, and *John Claytor*.

It is stated in the bill, that *Charles D. Hodges*, being seized of certain parcels of land, by his bond with a collateral condition, contracted, in consideration of the sum of $3,000 to convey them to this plaintiff, who to secure the payment of that amount as the purchase money, gave his bond to *Hodges*, who assigned it to *Benjamin Hodges*, who assigned it to *Nicholas Watkins* of *Thomas*, to whom this plaintiff made assignments of sundry bonds and notes which he *Watkins* received as payment of this plaintiff's bond; that afterwards *Charles D. Hodges* died intestate, leaving a widow *Elizabeth* who was entitled to dower in the lands, and six children, *Elizabeth* the wife of *John Randall*, *Mary Ann*, *Lucinda*, *Margaret*, *Ellen*, and *Charles*, his heirs at law; that the widow married this defendant *Claytor;* that this plaintiff on the 15th of February 1815, filed his bill in this court against this widow with her husband *Claytor*, and these heirs, with *Benjamin Hodges* and *Nicholas Watkins* of *Thomas*, to obtain a title to the lands he had so purchased, which bill the defendants thereto answered; and the case having been submitted, it was on the 22d of May 1815 decreed, that this plaintiff should pay two-thirteenth parts of three thousand dollars to *John Claytor* and *Elizabeth* his wife in lieu of her dower in those lands; and, on the payment, by this plaintiff, to *Nicholas Watkins* of *Thomas*, of the balance appearing to be due on this plaintiff's bond, after deducting the two-thirteenth parts allowed in lieu of dower, that the heirs of the late *Charles D. Hodges* should convey the lands to this plaintiff; that *Nicholas Watkins* brought suit, in the name of the administrator of the late *Charles D. Hodges*,

on the bond so given by this plaintiff; and, in September 1817, recovered judgment for the whole amount thereof; that this plaintiff paid to *Nicholas Watkins* the full amount due to him, after deducting the two-thirteenths awarded to *Claytor* and wife, which he also paid according to the terms of the decree; that *Nicholas Watkins* is dead intestate, and administration on his estate had been granted to these defendants *Rachel H. Watkins* and *Benjamin Watkins*, who have revived the judgment recovered by their intestate, to be released on the payment of $892 75 with interest from the 2d of October 1827 and costs; upon which they threatened to issue execution. Whereupon the plaintiff prayed for an injunction to stay proceedings at law, &c.; which was granted as prayed.

The defendant *Claytor* by his answer admitted the allegations and facts set forth in the bill so far as he was concerned.

The defendants *Rachel H. Watkins* and *Benjamin Watkins* put in their joint answer, in which they also admitted the facts and circumstances set forth in the bill. But they averred, "that the said bond was assigned to their intestate during the lifetime of the said *Charles D. Hodges;* that their intestate paid the full amount due on the bond at the time of the assignment to him; that he had no knowledge of any deduction to be made therefrom in any event whatever: and these defendants do positively deny, that their intestate received bonds or notes in payment of the aforesaid bond; but they aver, that the bonds and notes which he did receive were received to be applied when collected towards the payment of the said bond; and that their intestate did, after due diligence in the collection of the said bonds and notes, apply what had been so collected to the diminution of the amount due on the bond, and credit was therefore given to the complainant. These defendants also aver, that the complainant's bill, mentioned in his present bill, to which their intestate was a defendant, was answered by him under a full belief and with an understanding by him and the complainant, that the said suit should not affect the interest of their intestate in the aforesaid bond, and should only operate to enable the complainant to obtain a conveyance for the land he had purchased; that their intestate relying on this understanding, and believing his interest was not to be damnified, employed no counsel nor made any defence, but suffered the counsel for the complainant to draw his answer, and the proceedings to be as hastily determined as possible; and that when the decree was passed in the said case, it was not considered as at

all affecting the interests of their intestate, either by him or by the complainant. These defendants further aver, that long subsequent to the passage of the decree aforesaid, their intestate, wishing to close this transaction relative to the bond aforesaid, brought suit against the complainant; that the complainant, aware of the understanding, previously here stated, and of his liability to their intestate, gave their intestate a judgment for the amount then due on the bond on his allowing all the credits which the complainant was then entitled to. These defendants also state, that at the April term of Ann Arundel county court, their intestate, in order to recover the balance then due on the aforesaid bond, instituted proceedings to revive the judgment aforesaid against the complainant; and that in consequence of the death of their intestate pending the proceedings aforesaid, these defendants appeared to the said suit, after which such proceedings were had, that at the October term of the said court for 1827, a judgment was obtained against the complainant in favour of the defendants for the amount then ascertained to be due. These defendants do positively deny that their intestate in receiving the sums of money in part payment of the bond aforesaid, ever did receive the same as a satisfaction thereof, or ever did admit that the bond was paid; but on the contrary always considered the complainant liable to him for the amount of the last aforesaid judgment; and that the complainant himself ever did, until a short time before the judgment aforesaid was about to be revived, consider himself, as these defendants believe, so liable to their intestate."

Upon a motion to dissolve the injunction on the coming in of these answers, it was continued until the final hearing or further order. After which the case was set down for final hearing by the plaintiff on the bill and answers; and the solicitors of the parties were fully heard.

6*th August*, 1828.—Bland, *Chancellor*.—This case having been set down for hearing on the bill and answers alone, without any general replication,—the answers must therefore be taken to be true in every particular, as well as to the matters alleged by way of avoidance as to those directly responsive to the bill. That is, the defendants are to be allowed the benefit of every *fact* advanced by them as a defence in their answers, as fully as if it had been put in issue by the plaintiff's general replication, and the defendants had established it by proof.(*a*)

(*a*) 3 Blac. Com. 448.

But these administrators rest their defence on the fact, that there was "an understanding by him, (their intestate,) and the complainant, that the said suit, (in which the decree of the 22d of May 1815, was passed,) should not affect the interest of their intestate in the aforesaid bond, and should only operate to enable the complainant to obtain a conveyance for the land he had purchased." In other words they admit, that the decree of the 22d May 1815, as it stands, is a sufficient basis for the plaintiff's equity; but they attempt to circumscribe its operation by setting up a previous understanding or agreement of the parties to it, as to what was intended to be its extent and effect. But no decree can be thus collaterally affected or impeached. Every decree stands, and must be allowed to stand, for what it purports to be on its face, until it has been revised or reversed in a solemn and proper manner.(*b*) Therefore, rejecting this ground of the defence, as being utterly inadmissible, even supposing the fact of the alleged understanding to be true, there is nothing in the answers which is at all at variance with the case presented by the bill.

It is certainly true as urged by the defendants' solicitor, that even at the hearing, the plaintiff's case, as stated by himself, must be shewn to have in substance, or in some essential bearing of it, such a character as will confer jurisdiction on a court of chancery; it must appear to be an equitable as contradistinguished from a mere legal cause of action. The bill must itself shew why it was necessary, or allowable for the plaintiff to leave the ordinary legal tribunals and come into a court of chancery to seek relief. It seems to have been formerly understood, that if it appeared upon the face of the bill, that the plaintiff's remedy was properly at law,—as where the bill was for the recovery of a debt due by bond,—if the defendant answered and confessed the bond, he could not demur to the relief; because, admitting the debt, he ought to pay it, and not proceed to litigate it in either *forum;* or if the plaintiff was proceeding for the recovery of damages, the defendant might demur; because the court could not settle the damages: but if he answered, he could take no advantage of it at the hearing; for having submitted to the jurisdiction of the court, it would have the quantum of damages adjusted in a feigned action at law.(*c*) The rule now however is, that if the defendant could have demurred to the bill,

(*b*) 2 Mad. Chan. 537; Barney *v.* Patterson, 6 H. & J. 204; (*c*) Gilb. For. Rom. 51, 53; North *v.* Strafford, 3 P. Will. 150; Pickering's case, 12 Mod. 171.

because of its not presenting a case of an equitable character, but, instead of doing so, has answered it, the court will not make a decree for relief at the final hearing.(*d*)

The case exhibited by this bill is, however, one of which a court of chancery may properly take cognizance. It is admitted on all hands, that the assignee of a bond takes it subject to all the equity to which the obligor is entitled, whether he has notice of that equity or not. The contingency which gave rise to this obligor's equity was of such a nature, that on its happening, he could only obtain the relief to which he was entitled in a court of equity.(*e*) He therefore came here and obtained relief accordingly, even against the assignee and the then holder of his bond, the intestate of the only two of these defendants who now resist his equity. After which that assignee, availing himself of the legal form of his claim, obtained a judgment at law, which this plaintiff, from the peculiarly equitable nature of his defence, was unable to prevent. I am therefore of opinion that this injunction must now be made perpetual, as well because this court should be consistent with itself, as because this plaintiff should have assured to him the full benefit of that to which he has been declared, by the decree of the 22d May 1815, to be equitably entitled.

Whereupon it is Decreed, that the injunction heretofore granted in this case be and the same is hereby made perpetual, and that the said defendants pay to the said complainant his costs, to be taxed by the register.

The defendants appealed, and the Court of Appeals affirmed the decree.

(*d*) Barker *v.* Dacie, 6 Ves. 686; Penn *v.* Baltimore, 1 Ves. 446; Brace *v.* Taylor, 2 Atk. 253; Hovenden *v.* Annesley, 2 Scho. & Lefr. 638; Utterson *v.* Mair, 2 Ves. jun. 97; Brooke *v.* Hewitt, 3 Ves. 255; Kemp *v.* Pryor, 7 Ves. 245; Piggot *v.* Williams, 6 Mad. 95; Gover *v.* Christie, 2 H. & J. 67; Taylor *v.* Ferguson, 4 H. & J. 46; Pollard *v.* Patterson, 3 Hen. & Mun. 85; Yancy *v.* Fenwick, 4 Hen. & Mun. 423; Martin *v.* Spier, 1 Hayw. 370; Hart *v.* Mallett, 2 Hayw. 136; Dickens *v.* Ashe, 2 Hayw. 176.—(*e*) Mole *v.* Smith, 1 Jac. & Walk. 645.

MORETON *v.* HARRISON.

A defendant may, at the same time, plead several distinct pleas in bar, in equity as well as at law.

If a defendant pleads the statute of limitations, and there be any allegations in the bill of partial payments, &c.; which, if true, would take the case out of the statute, the defendant must, by an answer in support of his plea, deny such allegations.

A plea may, without replication, be set down to obtain the judgment of the court as to its formality and sufficiency.

The vendor's lien, to secure the payment of the purchase money, is an incident of every contract for the sale of real estate; unless such lien be waived or relinquished.—A vendor's lien can only be barred by a lapse of twenty years.—An admission by the vendee, within the twenty years, that the purchase money has not been paid, sustains and continues the vendor's lien.

This bill was filed on the 29th of November 1825, by *Joseph Moreton*, administrator *de bonis non* of *John Westeneys*, and *James I. Pattison* administrator *de bonis non* of *James Pattison*, against *Walter Harrison*.

The bill states, that the late *James Pattison* being seized in fee simple of a tract of land, called *Hunt's Mount*, the one half of which he held to his own use, and the other half in trust for the use of the late *John Westeneys;* that they sold it in the year 1787, for the sum of £640, to the defendant, who stipulated by bond to pay for it before the first of September 1790; that they delivered the possession of it to the defendant on the 24th of December 1787, who has held and enjoyed it ever since; that a small part of the purchase money had been paid, for which credit had been given; and, that there remained due, at the time of the death of the vendors, *Pattison* and *Westeneys*, the sum of £555, for principal and interest, which has not been since paid; and which the defendant had failed or refused to pay.

Whereupon the bill prayed, that the defendant might be ordered to account with the plaintiffs concerning the balance of the purchase money, and be compelled to satisfy the same; that is to say, one half to the plaintiff *Moreton*, and the other half to the plaintiff *Pattison;* or in default thereof, that the land be sold: and that the plaintiffs might have such further and other relief in the premises as might be consistent with the principles of equity.

On the first of July 1826, the defendant put in the following pleas on oath; but without any answer whatever.

"The plea of *Walter Harrison* of Ann Arundel county to the

bill of complaint of *Joseph Moreton*, administrator *de bonis non* of *John Westeneys* and *James I. Pattison*, administrator *de bonis non* of *James Pattison*.

"This defendant, by protestation to all the discoveries and relief in and by the said bill sought from or prayed against this defendant, for plea unto the said bill, saith; That if *John Westeneys* deceased and *James Pattison* deceased, or the complainants, as administrators *de bonis non* of them, the said *John Westeneys* and *James Pattison* in the bill named, ever had any cause of suit against this defendant, for or concerning any of the matters or transactions in the said bill of complaint mentioned, the same did arise above twelve years before filing the said bill, and above twelve years before serving this defendant with any process to appear to answer the same.

"And this defendant further for plea says and doth aver, that this defendant did not at any time within twelve years before filing the complainants' said bill of complaint, nor within twelve years before this defendant was served with process to appear and answer thereto, ever promise and agree, or in any manner bind himself to pay or satisfy the said *John Westeneys* and *James Pattison* in their lives, or the said complainants as administrators *de bonis non* of the said *John Westeneys* and *James Pattison* the sum of money mentioned and expressed in the bond marked exhibit A, filed by the complainants with their said bill, and referred to by them; or any sum of money, for or concerning any of the matters, or transactions in the complainants' said bill of complaint charged or alleged. And therefore this defendant pleads the act of The General Assembly of the Province (now State) of Maryland, passed at a session of Assembly begun and held at the city of Annapolis, the twenty-sixth day of April, in the year of our Lord one thousand seven hundred and fifteen, entitled "An Act for Limitation of certain actions, and for avoiding suits at law"—and prays the benefit of the said act.

"All which matters this defendant doth aver and plead in bar of the complainants' said bill, and of the complainants' pretended demand for which they seek to be relieved by their said bill. And this defendant prays hence to be dismissed with his reasonable costs in this behalf wrongfully sustained."

These pleas were submitted, without replication, on the notes of the solicitors of the parties, to take the opinion of the court on their sufficiency.

22*d December*, 1826.—Bland, *Chancellor*.—These pleas have been set down for hearing without a replication; consequently, the sole object is to obtain the judgment of the court on their sufficiency as they stand at this stage of the proceedings. The bill charges, in substance, not only, that the defendant for a valuable consideration became indebted to the intestates of the plaintiffs; but it also goes on to allege, that the defendant afterwards paid a part of the debt; and that although he, "well knows and has repeatedly admitted the said sum of money and interest to be due, and has promised at various times to pay the same," yet he has not done so.

It is perfectly well settled, that a partial payment is such an acknowledgment of the existence of the debt as will take the case out of the statute of limitations. But in this case, the partial payment referred to was made on the 16th of October 1793, and this suit was not instituted until the 29th of November 1825, a lapse of more than thirty years. This, therefore, is clearly not such an allegation, as if admitted to be true, would take the case out of the statute of limitations. But the subsequent promises, charged to have been made by the defendant, certainly would prevent the statute from being applied as a bar if admitted to be true.

It is an established principle, that where any allegation of the bill would avoid the bar created by the statute, such allegation must be specially denied by an answer in support of the plea; for otherwise, it will be taken as true, and the plea can then be no bar; because it will appear upon the face of the proceedings to have been sufficiently avoided. There is, in this case, no answer denying the subsequent admissions and promises charged to have been made; consequently, they must be taken for true, and are an ample avoidance of the pleas; which, therefore, can be of no avail whatever.

In the case of *Morgan* v. *Roberts* the defendant put in *three* pleas. No objection was made on the ground, that a defendant could not in equity, as well as at common law under the statute, be allowed to plead two or more pleas in his defence; and I sustained two of them, and overruled the third. Since then my attention has been particularly called to this point. This matter in England seems to be not yet finally settled.(*a*)

At common law, in almost all criminal cases, the accused is

(*a*) Whitbread *v.* Brockhurst, 1 Bro. C. C. 417; 2 Ves. & Bea. 153, note; Gibson *v.* Whitehead, 4 Mad. 241; Van Hook *v.* Whitlock, 3 Paige, 419; Beam. Pl. Eq. 14; Mitf. Pl. 296; Wyat's Pra. Reg. 280.

allowed to plead, at the same time, two or more pleas in bar;(b) and, in all civil cases, the defendant is allowed, by the statute of Ann, which has always been the received law here, to plead double. Equity follows the law; and the peculiarly liberal principles of our code seem to require, that this court should not be more technical, or less willing than a court of common law, to receive the defendant's defence in any number, or variety of forms deemed necessary by him, to render it completely effectual; for the reason why duplicity should not be allowed in the same plea, does not apply as against several distinct pleas.(c) Although a plea is not the only mode of defence in chancery; and there may not be as great a necessity to allow a defendant to plead double in equity as at law; yet it is sufficient, that justice may in most instances be promoted by it; and that no positive mischief is likely to arise from it in equity more than at law. Long experience has satisfied every one of its utility at law; and there is no apparent sound reason which forbids the adoption of a similar practice in courts of equity.(d)

(b) 2 Hawk. c. 23, s. 128, 137; 2 Hale Pl. Cro. 239, 248; The King v. Gibson, 8 East, 107; The Commonwealth v Myers, 1 Virg. Ca. 188.—(c) 2 Mont. Dig. 99, 100.

(d) 1829, ch. 220.—RIDGLEY v. WARFIELD.—This bill, filed 5th May 1779, states, that the plaintiff and defendant deduce their title to certain land from a certain Richard Davis, but that the conveyance from one of the sons and devisees of Davis to the defendant, had in fact conveyed to him more than it was intended and meant to convey. Prayer, that the defendant might be confined to the true extent of the grant, &c.—To this bill the defendant presented the following defence.

The pleas and demurrer of Seth Warfield to the bill of complaint of Henry Ridgley.—The said defendant by protestation, not confessing or acknowledging all or any of the matters or things in and by the said bill of complaint set forth and alleged to be true, in such manner and form as the same are therein set forth; as to so much and such part of the said bill, which seeks a discovery or relief from this defendant relating to any parol contract, or agreement made or supposed to be made between Thomas Davis and Stephen Steward, in the said bill mentioned, for the said tract of land called Davis's Purchase, or any part thereof different or variant from the deed said to have been executed in the said bill, on or about the twenty-ninth day of November seventeen hundred and fifty-six, by the said Thomas Davis to the said Stephen Steward; and as to so much of the said bill which seeks a discovery or relief from this defendant relating to any parol contract or agreement made or supposed to be made between the said Stephen Steward and this defendant for the said tract of land called Davis's Purchase, or any part thereof, different or variant from the deed or conveyance said to have been executed, (in the said bill,) on or about the fourteenth day of December seventeen hundred and sixty-two, by the said Stephen Steward and Joshua Davis to this defendant: He, this defendant, doth plead, that by an act of Parliament, made in the twenty-ninth year of the reign of his late Majesty King Charles the second, entitled an Act for prevention of Frauds and Perjuries, it is, amongst other things, enacted; that, from and after the twenty-fourth day of June sixteen hundred and seventy-seven, no action shall be brought, whereby to charge

These pleas, in the first place, aver, that the cause of action arose above *twelve* years before the institution of the suit; and then

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any person upon any contract of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized; as by the said act may appear; and this defendant avers, that neither the said Thomas Davis, nor any person by him lawfully authorized, did ever make or sign any contract or agreement in writing for the sale or conveyance of the said tract of land called Davis's Purchase, or any part thereof, to the said Stephen Steward to any such effect, as by the said bill is suggested, or any memorandum or note in writing of any agreement whatsoever for or concerning the said premises, or any part thereof; other than or different from the said deed, alleged in the said bill to have been made by the said Thomas Davis to the said Stephen Steward; and this defendant also avers, that neither he, the said defendant, nor any person by him lawfully authorized, did ever make or sign any contract or agreement in writing with the said Stephen Steward respecting the said tract of land called Davis's Purchase, or any part thereof, or any memorandum or note in writing of any agreement whatever, for or concerning the said premises, or any part or parcel thereof; and, therefore, this defendant doth plead the said act of parliament, and the matters aforesaid in bar to so much of the said bill as seeks to compel the defendant to execute any deed or conveyance to the complainant of the aforesaid premises, or of any of them, or of any part or parcel thereof pursuant to the said pretended agreements or either of them; and as to any relief thereby prayed touching the said agreements or either of them; and humbly prays the judgment of this Honourable Court whether he shall be compelled to make any further or other answer to so much and such parts of the said bill as are herein before and hereby pleaded unto as aforesaid.

And this defendant for further plea unto the said bill saith, that if the complainant, or any of those from under whom he claims, ever had any cause of suit for or concerning any of the matters, transactions, or things in the said bill of complaint mentioned, (which this defendant doth in no sort admit,) the same did accrue or arise above twenty years before the filing the complainant's bill of complaint; and above twenty years before the serving this defendant with any process to appear to and answer the same, during all which time the said Stephen Steward, and all those claiming under him have constantly acquiesced under the said deed or conveyance alleged to have been made to him by the said Thomas Davis; that is to say, from the time of making the same until the time of filing the complainant's said bill; wherefore this defendant doth plead the act of parliament or statute of limitations made in the twenty-first year of king James the first; and also the length of time and acquiescence, and prays the benefit of the same; all which matters this defendant doth aver and plead in bar of the complainant's said bill, and of the complainant's pretended demands for which he seeks to be relieved by the said bill.

And this defendant further saith, that he is advised by his counsel, that there is good cause of demurrer to the said bill, and that there is no matter or thing in the said bill contained good and sufficient in law to call this defendant in question in this honorable court for the same; but that there is good cause of demurrer thereto: and for cause of demurrer, this defendant saith, that, by the complainant's own shewing, the said bill, (in case the allegations therein contained were true, which this defendant does in no sort admit,) contains not any matter of equity whereon this court can ground any decree or give the complainant any relief or assistance as against this defendant: wherefore and for divers other errors and imperfections in the said bill

farther say, that the defendant did not promise or assume to pay the debt at any time within twelve years before the complainants filed their bill. Regarding these allegations as two distinct pleas, they are, as pleaded, each of them, informal and wholly insufficient. And, taking them as one plea, it is multifarious and double. Duplicity is a vice in pleading, and singleness is no less necessary in equity than at law. This plea must, therefore, be overruled.(*e*)

The object of this bill is to enforce an equitable lien by a vendor against a vendee, and to have the land sold, in virtue thereof, for the payment of the balance of the purchase money. Whether a plea, that the cause of action had been more than *twelve* years standing grounded on the act of assembly,(*f*) in any, the most correct form, would avail against a claim of this kind, does not appear to have been at all considered, or alluded to. I shall therefore express no opinion upon the subject.

Whereupon it is ordered, that the said pleas be and the same are hereby overruled: and the defendant is required to make a good and sufficient answer to the plaintiffs' bill of complaint on or before the fifteenth day of February next.

The defendant filed his answer within the time prescribed; in which he admitted the purchase and possession, but relied on the lapse of time, &c. The plaintiff put in a general replication; and commissions were issued and testimony taken and returned; after which, with the leave of the court, the plaintiffs so amended their bill as to make the heirs at law of the late *James Pattison*, who at the time of his death was seized of the whole legal title to the lands, parties plaintiffs in this suit.

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appearing, this defendant doth demur in law thereunto; and humbly demands the judgment of this honourable court, whether he shall be compelled to put in any further or other answer to the said bill; and humbly prays to be hence dismissed with his reasonable costs in this behalf most wrongfully sustained.

THOMAS JENINGS, for Deft.

2*d September*, 1789.—ROGERS, *Chancellor*.—Decreed, that the bill aforesaid of the complainant be dismissed, and the same is hereby dismissed; and that the said complainant pay to the said defendant his costs in this behalf expended.—*Chancery Proceedings, Lib. S. H. H., letter B.* 722.

N. B. Recollecting, as has been before explained, (*H. K. Chase's Case, ante*, 217,) that a demurrer is overruled by a plea, it is obvious, that this decree must have been founded upon the propriety of thus pleading two pleas, and upon the validity of one or both of the pleas.

(*e*) Whitbread *v.* Brockhurst, 1 Bro. C. C. 417; S. C. 2 Ves. & Bea. 153, note.
(*f*) 1715, ch. 23, s. 6.

26*th August*, 1828.—Bland, *Chancellor*.—This case standing ready for hearing, and having been submitted on notes by the respective solicitors, the proceedings were read and considered.

It appears, that *James Pattison* in the year 1787, was seized in fee of a tract of land called *Hunt's Mount*, containing one hundred and sixty acres, the one half of which he held as his own, and the other moiety in trust for the use of *John Westeneys;* that, on the 24th of December 1787, they sold this land to *Walter Harrison*, for the sum of four pounds per acre, the one-fourth of the purchase money to be paid on the first of May 1789, one other fourth on the first of September following, and the other two-fourths on the first of September 1790; the whole to bear interest from the time *Harrison* obtained possession. Other stipulations are contained in the contract, but they have no material bearing upon the matters put in issue between the parties to this suit. The land was accordingly delivered to *Harrison* on the 24th of December 1787, and he has had peaceable possession of it ever since. He made several partial payments, the last of which was on the 16th of October 1793, but there is no proof, that he ever made any other or further payments since that time. This contract and these payments are shewn by a bond, marked as the plaintiffs' exhibit A, given by *Harrison* to *Pattison* and *Westeneys*, dated on the 24th of December 1787, with the acknowledgements of the payments endorsed thereon. Some time after these transactions *Pattison* and *Westeneys* died.

The defendant in his answer admits the contract for the land, and his possession of it as stated in the bill, but he says, that in pursuance of his contract he made, at different times, considerable payments, but from the length of time is unable to state the precise amount of each; and does not admit, that he has obtained credit for all he has paid; nor can he admit, that any part of the purchase money is due from him; and he denies that he has admitted to any one, that any part of said money was due, or that he has promised at any time to pay the same. He then alleges and pleads in bar of the plaintiffs' claim, that the *debt*, in the condition of the writing obligatory mentioned, has been standing and in action above *twelve* years before the institution of this suit, therefore he relies upon the act of limitations. In addition to which he relies upon the great lapse of time since *the debt became due*, and before this suit was brought, as furnishing evidence of the payment of the *said debt*. Thus it appears, that the defendant rests his defence

upon a denial of the admissions and promises charged in the bill; upon the positive bar of the statute of limitations in relation to bond debts; and upon the presumption of payment arising from the lapse of time.(g)

The defendant's solicitor seems to have considered the contract, upon which this suit has been instituted, as a mere stipulation for the payment of money, and nothing more. But there is a substantial distinction between a loan of money and a sale of property. In a contract of loan there never is any other intention than that of creating the relation of debtor and creditor; and the contract is as complete, and the relation of debtor and creditor attaches as firmly without as with a written evidence of the debt. A mortgage, bond, or note, given as a security, is a mere accidental circumstance in a transaction concluded and complete by the advance of the money. The stipulation entered into as a security is an addition which does not arise as an incident, or in any respect follow as a necessary legal consequence of a contract of loan. In a sale of real estate the principles of equity are materially different. In purchase, payment is an essential part of the contract; consequently, where the whole, or any part of the purchase money remains unpaid, it is an established general rule, derived to us from the civil law, that the vendor holds a lien upon the estate sold for the purchase money unpaid. The adjudications upon the subject have occasioned some difficulty in ascertaining what shall amount to a waiver or relinquishment of this equitable lien; but it is perfectly well settled, that in every case of a purchase of real estate, where there has been no such waiver or relinquishment, the vendor has a lien upon the property sold to secure the payment of the purchase money, as against the vendee, his heirs, and all others who take under him with notice. This vendor's lien is an equitable incident uniformly and necessarily arising from, and associated with every contract of bargain and sale of real estate, where the purchase money is not paid; and, is considered as parcel of the contract itself, unless it be shewn to have been tacitly or expressly abandoned.(h)

The case presented by this bill is one arising on a contract of bargain and sale of real estate with an incident lien for the pay-

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(g) Mitf. Plea. 306.—(h) Sug. Vend. & Pur. ch. 12; Pow. Mort. 1062; Brown v. Gilman, 4 Wheat. 256; Bayley v. Greenleaf, 7 Wheat. 46; Tompkins v. Mitchell, 2 Rand. 428.

ment of the purchase money. It is this, or there is nothing in the bill to give the court jurisdiction; for, if it were a mere loan, in which the relation of debtor and creditor was created, to which was added the security of a bond, to insure the payment of the debt due, the plaintiffs would have a complete remedy at law, and this court could not take cognizance of the case; nor would the prayer in the bill for an account give the court jurisdiction, since the case is not, in itself, a proper one for an account,—there being no mutual dealings which give rise to a series of charges on one side as opposed to a variety of payments on the other.(*i*) This is a single stipulation and charge; and the object is to enforce the equitable lien as being a part of the contract of sale.

This equitable lien is to be found classed, in all the books, with mortgages; it is however not precisely the same, in all respects, as an ordinary mortgage, given as a security for a loan of money: but it is a specific lien, in most respects so strongly analogous to the specific lien of a common mortgage, that they have been almost altogether regulated by the same principles of equity. But these securities,—neither the incident, nor the express lien as by mortgage,—should not be confounded with mere personal securities, or obligations for the payment of money of any class or grade whatever. A bond, promissory note, or simple contract for the payment of money, in any shape or form, is a personal contract which surely cannot, either at law or in equity, be assimilated to, or governed by the principles applicable to a mortgage of any description.

These plaintiffs do not ask to have their specialty or simple contract enforced as a means of obtaining payment from their debtor. They do not plant themselves on the mere relation of creditors against this defendant as their debtor. They are here as vendors against the defendant as their vendee; and they claim the benefit of the lien which they hold as an incident of that relationship. As mortgagees they sue this defendant as the mortgagor of certain property, which they ask to have sold to satisfy the balance due upon that mortgage. This is the light in which this controversy must be considered; consequently, the statute of limitations in relation to bonds and simple contracts for the payment of money can have no sort of application to this case.

This equitable lien is so far a mortgage, that the limitation or

(*i*) Dinwiddie *v.* Bailey, 6 Ves. 141; Smith *v.* Marks, 2 Rand. 449.

presumption of satisfaction arising from the lapse of twenty years, as applicable to ordinary mortgages, does, in like manner, furnish evidence, or a presumption, that such equitable lien has been satisfied or discharged. An equitable lien is founded upon the principle, that the legal title has not been parted with, or ought not to be considered as completely vested in the vendee until the whole purchase money has been paid; because it is deemed unjust to consider any one as the absolute legal owner of property which he has purchased, but has not paid for. If the whole legal title remains in the vendor, he may bring an ejectment, to which a limitation of not less than twenty years is a bar: but if the formal legal title has been parted with by the vendor before payment, then his having so ceded it, gives him an equitable right to enforce payment here with all the advantages he had as the actual holder of the legal title; that is, as a mortgagee coming here to foreclose; in which case, by analogy to the statute of limitations, no time short of the lapse of twenty years is ever deemed sufficient to raise a presumption of satisfaction. This court has repeatedly acted upon these principles.(*j*)

This bill has been treated by the defendant as a suit instituted to recover the money secured by the bond alone, or a debt due by simple contract. If that were the fact, the conclusions which he has deduced, it is admitted, must inevitably follow. But it has been shewn that such is not the fact; and the circumstance, of the purchase money having been secured by a bond, in addition to the security of the equitable lien, cannot in the slightest degree affect the plaintiffs' right to the relief they ask by this bill. In all cases of the sale of real estate the purchase money, if not paid, may be secured in various ways. The vendor may take a mortgage, but by doing so he virtually waives his equitable lien; he may take a bond, and also a note in addition to a mortgage, or the equitable lien, of which the bond or note will not generally amount to a virtual waiver. If he takes all these assurances, then it is well settled, that he may proceed at law and in equity upon each of them at one and the same time, and recover upon all, although he can have but one satisfaction.(*k*) To his ejectment at law and bill in equity to foreclose, twenty years is the limitation; to his suit upon the bond, twelve years constitutes a bar; and to his action

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(*j*) Lingan *v.* Henderson, ante, 282.—(*k*) Pow. Mort. 966, note G.; Hughes *v.* Edwards, 9 Wheat. 494.

upon the simple contract a limitation of three years is a bar. But although in the actions upon the bond and the simple contract judgment may be rendered against him, upon the plea of limitation applicable to each, that cannot, in any manner, affect his remedy by ejectment or the bill to foreclose.(*l*)

It appears, that more than thirty-two years have elapsed since the last payment before this suit was instituted. This great lapse of time affords ample ground for the presumption of satisfaction upon which the defendant relies; and if not explained or repelled must be admitted to be a complete bar to the plaintiffs' claim. Lapse of time operates as a bar, because of its raising a presumption either, that the claim never existed, or if it had once existed, that it has been satisfied. It cannot however be presumed, that this claim never existed, because that is expressly admitted by the defendant himself; consequently this lapse of time can only be insisted on so far as it affords a presumption of satisfaction. The defendant avails himself of it in like manner as he might have done of positive proof of payment. He adduces and relies upon it as evidence to sustain an allegation of payment.(*m*)

But the defendant does not frankly and directly declare, that he had actually paid the whole amount of the purchase money. After expressly admitting the contract, he then says, he does not admit, that he has obtained all the credits he ought to have; he denies that he admitted to any one, that any part of the purchase money was due, or that he promised to pay it; and he does not admit, that any part of the purchase money is due from him. All this, according to the letter, may be true, and yet the defendant may well know in his conscience, that he has not paid the whole purchase money. If he knew he had actually paid it, why not expressly say so, instead of saying he did not admit that any part of it was due from him? Perhaps, by a sort of mental reservation he meant to say, he did not admit it was due, not because he could, with a clear conscience, say he had, in reality, paid it; but, being authorized to rely upon the presumption arising from the lapse of time, he therefore did not admit it was due from him. This is certainly a very stale claim; but its being so ought not to be received as an apology for the slightest departure from that frankness which the court always expects from a defendant when

(*l*) Toplis *v.* Baker, 2 Cox. 123.—(*m*) Pow. Mort. 361. note, 1153, 1155; Chalmer *v.* Bradley, 1 Jac. & Walk. 63; Christophers *v.* Sparke, 2 Jac. & Walk. 233.

called on to speak of matters within his own knowledge. But although this very guarded language of the defendant does look a little suspicious, yet it must be admitted, since no exception has been taken to his answer, that he has said enough to entitle him to rely upon the presumption of satisfaction.

The witness *Lewis Sutton* says, that the defendant admitted to him early in the year 1820, that he had not then paid the whole amount of the purchase money. This testimony positively contradicts one of the defendant's allegations, and diminishes the extent of the presumption relied on by him: it is calculated to shake our faith in his answer. Still, the claim is a stale one; and there is some scope left on which to rest a presumption of satisfaction.

The witness *Benjamin Carr* says, that about February 1825, "he had a conversation with the defendant *Walter Harrison* relative to the agreement between him and *Westeneys* and *Pattison* for the purchase of a tract of land called *Hunt's Mount* in Ann Arundel county: that the defendant commenced the conversation by informing him that *Pattison* and *Moreton* had laid down the land, and that they were now contending for it; that the first payment which he, *Harrison*, had made, was made in tobacco; after which payment there was a dispute took place between *Pattison* and *Westeneys*, each forbidding him, *Harrison*, from making any further payment to the other; and *Harrison* said he afterwards deposited the purchase money for said land in the bank." This testimony, which has not been in the slightest degree impeached, does most satisfactorily, when taken in connexion with all the circumstances of this case, repel the presumption, and account for the delay.(*n*) Payment was not urged because of the dispute between those who were to receive; while that controversy continued, the defendant might have been very unsafe in paying to either of them; and therefore it was to his advantage to wait until they united in the demand or made it in this way by a suit, or in such other form so as he could be assured the payment might be safely made.

Whereupon it is decreed, that the defendant *Walter Harrison*, on or before the 26th of September next, pay or bring into this court to be paid to the said plaintiffs, *Joseph Moreton*, administrator *de bonis non* of *John Westeneys*, and to *James I. Pattison*, administrator *de bonis non* of *James Pattison*, to each

(*n*) Pow. Mort. 392.

one an equal moiety of the sum of $4,641 21, with legal interest on $1,501 20, part thereof, from this day until paid or brought in, together with all the costs of this suit incurred by each of the said complainants: and, that on the defendant's failing to pay or bring into court the said sum of money with interest and costs as aforesaid, the property in the proceedings mentioned be sold for the payment thereof; that *Augustus E. Addison* be and he is hereby appointed the trustee, &c. &c.

In pursuance of this decree the land was sold, and the sale having been finally ratified, on the 30th June 1829, the proceeds were paid to the plaintiff *Moreton*, to whom they were shewn to belong exclusively, in consequence of the other plaintiff *Pattison* having received satisfaction to an equal amount.

HODGES *v.* MULLIKIN.

On an application for leave to file a bill of review on the ground of newly discovered matter; whether it is in truth newly discovered or not, is a question, which must be then traversed and finally determined, so as not to leave it open upon the bill of review itself.

A co-defendant, as to whom a decree is not asked to be opened, or cannot be opened, is a competent witness as to any fact upon which another defendant prays to have the decree opened.

A trustee, whose liability cannot be altered by the opening of a decree, is, upon that question, a competent witness for either party.

An attorney whose client is not a party, to object or consent to his examination, cannot be permitted to speak of any facts which came to his knowledge as such.

If the new matter actually came to the knowledge of the party, or might have been known to him, by reasonably active diligence, so long before the decree as to have enabled him to have had the matter put upon the record at the hearing, no bill of review will be allowed.

Although the party, applying for a re-hearing, may himself have no merits, yet if he shews. that the interests of innocent third persons, or those for whom he is trustee may be injuriously affected, the re-hearing will be granted.

The lien of the State commences with the institution of the suit, and therefore it should be distinctly shewn.

This bill was filed on the 15th June 1822, by *Benjamin Hodges* against *Thomas Harwood* of *Ben.* and *Benjamin Mullikin;* and it alleges, that the defendant *Harwood* had, by a deed bearing date

on the 7th of April 1810, conveyed certain real and personal estate to the defendant *Mullikin* and *Benjamin Harwood*, who is since dead, and to the survivor of them, in trust for the purposes therein mentioned; and that afterwards, on the 13th of March 1817, the defendant *Harwood* mortgaged the same property to the plaintiff, which mortgage debt was then due and unpaid: whereupon it was prayed, that the mortgaged property might be sold, &c. The defendants put in their answers; and, on the 2d of May 1825, a decree was passed ordering the mortgaged estate to be sold, &c.

On the 25th of August 1828, the defendant *Mullikin* filed his petition, on oath, setting forth particularly all the circumstances of his case: upon which he prayed for leave to file a bill of review, &c.

27*th August*, 1828.—Bland, *Chancellor*.—Ordered, that the matter of the aforegoing petition stand for hearing on the thirteenth day of September next; and each party is authorized to take testimony, before any justice of the peace, to be read at the hearing, on giving to the opposite party three days notice as usual. Provided that a copy of this order, together with a copy of the said petition, be served on the complainant on or before the fifth day of September next.

Under this order testimony was taken and returned; sundry documents were filed in relation to the matter of the petition; and the case was thus brought before the court.

10*th October*, 1828.—Bland, *Chancellor*.—The matter of the petition of the defendant *Mullikin* standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It appears, that the defendant *Thomas Harwood* was indebted to the State, and also to several individuals; for the payment of which debts, the late *Benjamin Harwood* and the defendant *Mullikin*, had become bound, by bond or by promissory notes, as his sureties; and that, for the purpose of saving harmless these his sureties, he executed a deed, on the 7th of April 1810, by which he conveyed certain real and personal property to them, and the survivor of them, in trust for the payment of those specified debts for which they or either of them were bound as his surety: and, in case either of those debts were not paid, within five years from that day, with power to sell the whole, or so much thereof as might be necessary to satisfy them. After the execution of this deed of trust, this *Thomas Harwood* being indebed to the plaintiff *Hodges*,

he, *Harwood*, on the 11th of September 1810, by a deed legally executed, mortgaged the same property to *Hodges* for the debt due to him. But as this mortgage recites the deed of trust, *Hodges* could only take subject to the prior lien created by that deed.

On this state of things, *Hodges* filed his bill, on the 15th of June 1822, against *Thomas Harwood*, and *Benjamin Mullikin*, as the surviving trustee, to have the property sold for the satisfaction of the debt for which it had been mortgaged; by his bill, he makes an exhibit of the deed of trust as well as the mortgage, and states, that *Benjamin Harwood* was dead; in consequence of which the trust had survived to the defendant *Mullikin*. This suit, thus instituted, was marked on the docket for the use of *Wilson & Sons*. *Harwood*, in his answer, filed on the 12th of December 1822, states, that the debts specified in the deed of trust were still unpaid, and insists that a decree in favour of *Hodges* cannot be passed; on the ground, that those creditors have a prior lien, and should be made parties. But *Mullikin*, in his answer, filed on the 14th of July 1823, merely says, that he has sustained no injury; has no claim to the property mentioned in the deed of trust; and submits to such decree as may be deemed just. To these answers a general replication having been filed, a commission was issued, which having been returned without collecting any proofs, the case was submitted on the notes of the solicitor for the plaintiff, and on the notes of the solicitor for the defendant *Harwood*. Upon which, on the 2d of May 1825, a decree was passed, that unless the defendant *Harwood* paid the mortgage debt and costs on or before the 2d of June, then next, the property should be sold. It does not appear, that the mortgage debt has been paid, or that any sale has been made under the decree.

On the 25th of August last the defendant *Mullikin* filed his petition, on oath, in which he sets forth particularly the course he had pursued, and how far he was uninformed; and concludes by averring, in general terms, that he acted throughout in ignorance of his legal rights and duties; in ignorance of the facts; and was misled and deceived by his co-defendant *Harwood*; by the gross neglect of the specified creditors to notify him of their claims; and by the omission of the plaintiff's solicitor, *Nicholas Brewer*, to inform him of the answer of the defendant *Harwood*, and the matters therein stated. Upon which the petitioner asked

leave to file a bill of review, or to have granted to him such other relief as the nature of the case might require.

It has been urged, that the petition, having been sworn to, is of itself sufficient ground for granting leave to file a bill of review; that it was entirely unnecessary to have taken any testimony in support of the allegations of the petition; and therefore, that it would be needless to decide upon the objections made to the competency of the witnesses who have been examined.

I have met with no instance in the English books, in which it appears, that any testimony had been taken and read at the hearing of an application for leave to file a bill of review grounded on an alleged discovery of new matter unknown before the decree. It is clear, that the party himself, as well as his solicitor, if the solicitor be alive, and there is any reason, from the circumstances of the case, to believe that he might have known of the alleged new matter, must each of them make a particular, full, and distinct affidavit, that he did not, before the decree, know of that which is stated as the newly discovered matter.(*a*) But, it is said to be necessary to state in such bill of review, that leave was obtained to file it, and the fact of the discovery; though it may be doubted, whether after leave given to file the bill, that fact is traversable; or whether, if it should not be admitted it must be proved at the hearing of the bill of review.(*b*) Hence it would seem, that the grounds upon which the leave is granted should, at one stage or other, be allowed to be traversed, and be required to be sustained by proof. If so, then it is obviously best for all concerned, that every doubt, as to the grounds upon which the leave rests, should be finally and conclusively settled before the bill is filed; for otherwise there would not be that security against the vexatious renewal of a suit which ought to exist, as contemplated by the rule which has been so long and so often approved; and besides, if it were otherwise, on the hearing of such a bill of review, the question, as to the propriety of the leave, would always be made or renewed as a preliminary point at that advanced stage of the proceeding.

In England this matter may be attended with some difficulty; as, I believe, the cheap and expeditious method of having testimony taken before a justice of the peace, respecting any interlocutory matter requiring an early decision, which has been so long and

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(*a*) 1 Harr. Pra. Chan. 179.—(*b*) Mitf. Plea. 89.

well established as a practice in Maryland,(c) is unknown to the chancery practice of England. On an application for leave to file a bill of review on the ground of newly discovered matter, I consider it most correct and conformable to the course of this court, in similar cases, that the propriety of granting the leave should be at once fully investigated; that proofs should be admitted to be introduced in relation to it; and that the question should be then finally determined; since the evidence, should any be wanted by either party, may be so fully and so readily collected by authorizing the parties to take testimony before a justice of the peace, to be read at the hearing of the application. But if no proof should be asked for, then the application may be determined upon the petition only as sworn to by the party applying. I am therefore of opinion, that according to the principles and practice in chancery of this State, the testimony in this case has been properly taken; and therefore must now be attended to so far as it can be considered as coming from competent witnesses.

It is objected that the defendant *Thomas Harwood* is an incompetent witness upon this occasion, because he is interested in having this decree thrown entirely open by a bill of review. In all cases, where there are two or more defendants, the court may, if the liabilities of the defendants are distinct, or are susceptible of being separated, pass a decree affecting each differently, or in favour of one and against another of them. But if the case is so blended and entire as to impose none other than a joint liability upon all, so that the responsibility of no one can be separated from the rest, then there must be a decree against all or none. And if any one defendant, in such an entire case, makes out a good defence, the bill must be dismissed as to all; and there can be no decree against any other defendant, even if he should have admitted the plaintiff's case, or the bill should have been taken *pro confesso* as against him. This position I take to be sufficiently clear and satisfactory upon the bare statement of it. But where the decree does not charge two or more defendants and is entire in its nature, it is not the course of the court to open or modify it further than is indispensably necessary to correct the error complained of.(d)

Applying these principles to this case, it is clear, that this decree need not, and therefore will not be opened in any manner for the

(c) Clapham v. Thompson, ante, 124, note.—(d) Lingan v. Henderson, ante, 235; Ranelagh v. Thornhill, 2 Chan. Ca. 153.

benefit of the defendant *Harwood*; because he does not ask it; and because his liability, as set forth and admitted by himself in his answer, may well be separated from any charge against the other defendant *Mullikin*; therefore the judgment of the court, so far as it has bound his interests in favour of those creditors whose claims he has not paid, must be allowed to stand and have its full force; and will only be so modified as to let in other existing incumbrances upon the property conveyed in addition to that of the mortgage. Hence it is perfectly manifest, that *Harwood* is a witness whose interest cannot be at all affected if the decree remains altogether as it now stands; and if it should be opened for the benefit of the trustee, and *cestui que trusts* under the deed of the 7th April 1810, and no further than to let in their incumbrance in addition to that of the mortgage; then, as *Harwood*, has been introduced to have it opened for that purpose, he is a witness testifying against his own interest; so that, in either view of the subject, he is a competent witness upon the present occasion.

The competency of the witness *Nicholas Brewer* has also been objected to on the ground of his having an interest which must be affected by the decision now called for. The principles which have been just applied to the case of the witness *Harwood* have in some respects a bearing upon the situation of this witness. He is the solicitor of the plaintiff, and the trustee appointed by the decree to make the sale. The judgment of the court, so far as regards his client and the defendant *Harwood*, must be allowed to stand; and therefore he has earned some compensation as the solicitor of the plaintiff. He has not even yet, however, qualified himself, by giving bond, to act as trustee under the decree; but, in consideration of his forbearing to execute his trust, and of an extension of credit agreed to between the plaintiff and the defendant *Harwood*, he, *Harwood*, paid to *Brewer* $200, as it is said, in part of his commissions; and it is *Brewer's* liability to refund this sum, in case the decree should not be executed as it stands, that makes him, as is alleged, a witness interested to maintain the decree in favour of the plaintiff by whom he is produced. Forbearance to sue is a consideration sufficient in law to give validity to a promise.(*e*) And according to the rules and practice of the court, a trustee is only allowed full commission upon the amount of an actual sale; and if the parties prevent him from making

(*e*) Selw. N. P. 56.

sale, after he has qualified himself to act, he is allowed no more than half commissions.(*f*) Now, in whatever way this payment, made voluntarily by *Harwood* to *Brewer*, may be contemplated; whether as a solicitor's fee; or on account of forbearing to sell; or for commissions which the parties themselves, for their own advantage, prevented him from earning, I do not see how any decision, which I may now pronounce, can lay a foundation for making *Brewer* refund this money; or give to any one a better ground for demanding it of him than now exists. I am therefore of opinion, that he is a competent witness.

The witness *John Johnson*, it is objected, is not competent; because he acquired a knowledge of the facts about which he is called on to speak as an attorney. I take it to be well established, that an attorney or solicitor is at no time, either before or after the termination of the suit in which he was retained, authorized, without the consent of his client, to disclose any thing his client has communicated to him. This, however, is a privilege of the client, not of the attorney. And if the client be no party to the matter then in controversy so as to be able to communicate an express or tacit relinquishment of his privilege, the lips of his attorney must remain closed; and the court cannot allow him to speak of that which the policy of the law has prohibited him from disclosing.(*g*) This is a controversy, according to the order of the 27th of August last, between this petitioner and the plaintiff; therefore, if this witness had obtained his information as the attorney of the defendant *Harwood*, he could not now be heard; because *Harwood* is not here, as regards the present controversy, to waive his privilege, even if he were willing to do so. But the witness positively avers, that he could not and did not act as the attorney of *Harwood;* and that a knowledge of none of the facts, of which he speaks, was obtained as the attorney of him, or of any one else. Consequently he also must be considered as a competent witness.

Having thus disposed of the several preliminary questions, we may now sum up the facts and consider this application upon its merits. There is some contrariety in the particulars as they are related by the petition, and the depositions of the witnesses; but, after considering those discordances, and laying aside every thing

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(*f*) Gibson's Case, ante, 138.—(*g*) Pow. Mort. 583, note N.; Bac. Abr. tit. Evidence, A. 3; Clay *v.* Williams, 2 Mun. 122.

not materially bearing upon the question to be decided, the case appears to be this:

The defendant *Thomas Harwood* had conveyed his property to secure the payment of his debts to the extent, and in the manner set forth by his two deeds of the 7th of April and 11th September 1810. After which the plaintiff *Hodges* filed his bill as mortgagee to obtain the benefit of the deed of the 11th of September; setting forth the deed of the 7th of April, and making this petitioner *Mullikin*, the surviving trustee under that deed, a defendant along with *Thomas Harwood*. Which bill *Harwood* answered, acknowledging, that he had executed those deeds, and that he had not then paid the debts secured by either of them. On *Mullikin's* being served with a *subpœna* to answer, he at once apprehended, that it had relation to his situation as trustee under the deed of the 7th of April; and, therefore, he called on *T. Harwood* for information respecting the situation of the debts specified in that deed; and was told, that they were very stale; that more than twelve years had elapsed since they became due; and that he, *Mullikin*, could have no claim under the trust deed. But *Harwood* did not inform *Mullikin*, that suits had been brought, and judgments obtained against himself, and the late *Benjamin Harwood* before his death, by some of those creditors. *Mullikin* appears to have had the credulity to be thus turned aside by *T. Harwood* from making any further inquiry; and to have been induced to believe, that he might consider himself as completely exonerated, and as having no claim whatever upon the property mentioned in that deed. After which *Mullikin*, accompanied by *T. Harwood*, called on *Nicholas Brewer*, the plaintiff's solicitor, for the express purpose of obtaining information respecting the suit, so that he might put in his answer; and, from the conversation which then passed, it appears, that the impression was again renewed upon the mind of *Mullikin*, that, as he had not been, so he could not be injured; and therefore had no claim whatever upon the property mentioned in the deed of trust. And accordingly he answered to that effect, without then having before him, or ever having read either the bill, or the answer of *T. Harwood*, as is evident from his, *Mullikin's*, making a mistake in his answer, as to the names of the parties to the bill. After thus answering, it appears, that *Mullikin* rested satisfied, and had no further information respecting the matter until a short time before the filing of his petition in the month of August last. On the second of May 1825 a decree was passed, grounded

upon the admission of *Mullikin*, and the absence of any proof of the then existence of the debts mentioned in the trust deed, directing the mortgage debt to be paid, and if not, that the property should be sold for the satisfaction of that debt alone.

The law of the court in relation to bills of review was laid down in a set of ordinances or rules established by *Lord Bacon* as far back as the beginning of the year 1618. The sound sense and utility of those rules have been amply tested, and they have been adhered to ever since. In regard to the matter now under consideration, the rule is expressed in these words: "Upon new proof, that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special license of the court and not otherwise."(*g*)

According to the English practice, no new testimony can be introduced into the case after the *publication* of that which has been taken has passed; and therefore, if the discovery of new proof is made after publication, but before a decree, the case falls within the meaning of the rule; because although it came to light before the decree, yet it could not possibly have been used at the time the decree passed. But in Maryland the mode of taking testimony is different: here the testimony not being taken in secret, or during any period held closed up; the English order of publication, with its incidents and consequences, have been virtually abolished.(*h*) Here a party may at any time, even after the case has been set down for hearing, if the application be made on reasonable grounds supported by an affidavit, obtain a commission to take the testimony wanted.(*i*) And therefore, if the new proof comes to light at any time so long before the decree as to enable the party to apply for a commission, and he neglects to make such an application, he will not be allowed to have the benefit of the rule; because, by the exercise of due diligence, he might have had his testimony brought in so as to be used at the time of passing the decree.

It is expressly laid down, that forgetfulness or negligence of parties, under no incapacity, or of their solicitors, is no foundation for a bill of review;(*j*) and therefore, an executor, whose duty it is to

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(*g*) Beam. Ord. Chan. 2.—(*h*) 1785, ch. 72, s. 14.—(*i*) Howard *v.* Howard, MS. February 1806; Anderson *v.* McCabe, MS. 1807.—(*j*) 1 Harr. Pra. Chan. 175; Franklin *v.* Wilkinson, 3 Mun. 112; Jones *v.* Pilcher, 6 Mun. 425.

look diligently after the assets of his testator, and always to know the amount within his reach, cannot plead want of assets after the debt decreed.(*m*) So leave to file a bill of review was refused to be granted upon newly discovered evidence, of which the party was sufficiently apprised, by the suggestions in a letter and the proceedings in the case, to have enabled him, with reasonable diligence, to have put it upon the record originally. Because it was considered as most incumbent on the court to take care, that the same subject should not be put in a course of repeated litigation; and, that with a view to the termination of the suit, the necessity of using reasonably active diligence in the first instance should be imposed upon the parties.(*n*) It is not sufficient to show, that injustice has been done; but that it has been done, under circumstances which authorize the court to interfere; because if a matter has already been investigated, according to the common and ordinary judicial rules, a court of equity cannot take upon itself to enter into it again.(*o*) But, to show, that the party might, by the exercise of reasonably active diligence, have known, that which he alleges he has recently discovered, it is not enough, that the newly discovered proof was actually in his power at the time the decree was passed; it must also appear, that he knew of something, or that there was something in the case which might be considered as a suggestion, sufficient to apprise him, that there were such other facts and proofs pertinent to the case; and which it was his duty to have searched for; and, if practicable, to have brought in and put upon the record.(*p*)

It may be admitted, that the credulity of the defendant *Mullikin* has been played upon to a considerable extent, and that he has even been misled by those from whom he sought information; but, that by no means furnishes a complete justification of his gross negligence. He himself admits, that his co-defendant *Harwood* had told him, that the debts mentioned in the deed of trust were not paid; that information it was his duty, as a trustee, to have followed out until he had ascertained the real truth, before he ventured rashly to compromit the interests of the *cestui que trusts*. He ought, from that suggestion, to have obtained a full knowledge of every material particular respecting those debts; the entire disclo-

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(*m*) Suffolk *v.* Harding, 3 Rep. Chan. 88.—(*n*) Young *v.* Keighly, 16 Ves. 348. (*o*) Bateman *v.* Willoc, 1 Scho. & Lefr. 204; Wenston *v.* Johnson, 2 Mun. 305. (*p*) 4 Vin. Abr. 412.

sure of the facts in relation to which, being called for by the bill, ought to have been set forth by him in his answer. Before he filed his answer, it was his duty to have read and maturely considered the bill; and a very ordinary degree of care also required of him an examination of the proceedings, in which he would have found the answer of *Harwood*, in which the fact of the specified debts being then outstanding was stated and relied on as a defence, at least in preference to the claim of the plaintiff. Instead of which, this defendant *Mullikin*, with a reckless negligence, which no court of justice ought to tolerate, applied to the debtor, for whom he was surety, and to the solicitor of the plaintiff, for information; and, resting on what he thus learned, he filed an answer, carelessly drawn by the solicitor of the plaintiff, without ever having made the least inquiry in any other direction; although he had been thus amply apprised of the necessity of doing so. If the interests of this defendant alone were jeoparded; and, if no other person than himself were likely to suffer by letting this decree stand, I certainly could not open or modify it in any one single particular. He, who has been so egregiously negligent of his own rights, can have no claim to a rehearing, and a repetition of that litigation which he has so carelessly suffered to be terminated to his disadvantage.(*q*)

But, from the matters now disclosed, and for this purpose established, it appears, that there are other views of this case, and other consequences likely to arise from this decree as it now stands, than those which relate exclusively to the defendant *Mullikin*, and the injury which he alone may probably sustain. The creditors, or *cestui que trusts* under the deed of the 7th of April 1810, are not parties to this decree; and, therefore, their rights cannot be bound by it; but nevertheless, if it is executed as it now stands, their interests may be greatly embarrassed, materially injured, or perhaps in some measure wholly sacrificed. If the real estate is sold under it, the parties with whom they may have to deal will be varied and multiplied; their case may be made more complex and difficult; and a sale of the personal property will be attended with at least the same consequences; and, in addition, it may be thereby removed entirely beyond their reach. Besides, this decree upon the proceedings as they now stand, would most grievously mislead a purchaser under it. He would be warranted in concluding, that the property had been discharged from the incumbrance of the deed of trust; because the

(*q*) Finley *v.* Bank U. S., 11 Wheat. 304

court itself had acted upon that belief, which it was authorized to edduce from the answer of *Mullikin* and the absence of any proof to the contrary; when in fact it had not been so released and could not be protected against that incumbrance, because those creditors had not been made parties.(*r*)

According to these views of the case, and looking to these consequences, it is perfectly evident, that this decree, if suffered to stand and be executed, may work material injury to those who ought to have been made parties to it, and who have never been called upon or heard in any way: and as to purchasers, it may operate as an instrument of deception and fraud. I feel it to be my duty, as far as practicable, to prevent any proceeding of this court from being thus used: and not to suffer the parties by any contrivance; or by the holding back of any circumstance, either wilfully or negligently, to make any of the solemn acts of the court operate perniciously and unjustly upon the rights and interests of innocent persons.(*s*) For these reasons therefore I shall afford the parties an opportunity of rectifying this decree; and for that purpose stay its execution until further order.

A mere bill of review would not be commensurate to the petitioner's objects; he must therefore be allowed to file such a bill as will introduce, as parties, all the creditors named in the deed of the 7th April 1810, in such a manner as to bring their interests, in connexion with those of the present parties, fully before the court.

Whereupon it is ordered, that all further proceedings under the decree of the second day of May 1825, be and the same are hereby stayed and suspended until the further order of this court. And it is further ordered, that the petitioner *Benjamin Mullikin* have leave to file a bill, in the nature of a bill of review, as prayed; whereby he shall make all the parties to the said decree parties to the said bill, together with the creditors, or their legal representatives, who are named in the said deed of the 7th of April 1810, in such a manner as to bring the interests of all the said parties, in the property mentioned in the said deed, fully before the court. And it is further ordered, that the said *Benjamin Mullikin* pay unto the said plaintiff all the costs which have accrued upon his, the said *Mullikin's*, said petition, including this order, to be taxed by the register.

(*r*) Finley *v.* Bank United States, 11 Wheat. 304; Clifton *v.* Haig, 4 Desau. 330.
(*s*) Gifford *v.* Hort, 1 Scho. & Lefr. 396, 399.

The defendant *Benjamin Mullikin*, on the 18th of November, 1828, filed a bill in the nature of a bill of review on oath, against *Thomas Harwood* of *Ben.*, *Richard Duckett* executor of *Daniel Clark*, and others; in which, after reciting the various newly discovered facts and circumstances, upon which he had founded his claim to have the decree of the 2d of May 1825 reviewed and corrected, he stated, that the creditors for whose benefit the deed of the 7th of April 1810 was made, have a lien on the property conveyed prior to that of those who now claim as assignees of *Hodges*, &c. &c. To this bill the defendants put in their answers; and by consent, on the 20th of August 1829, a decree was passed, directing the property to be sold, and it was sold accordingly: and the sale having been finally ratified, the auditor reported a distribution of the proceeds; to which exceptions were filed, and the case was submitted on notes by the solicitors of the exceptant.

16*th August*, 1831.—Bland, *Chancellor*.—The voucher of the State's claim is evidently imperfect. The lien of the State commences with the institution of the suit, not merely with the date of the judgment;(*t*) and therefore if the State has obtained these judgments, of the 13th of April 1812, on suits instituted before the 7th of April 1810, the State must have a preference over the creditors under the deed of that date. And, if both of the State's judgments were in suits instituted since that time, then it ought to be shewn for which the late *Benjamin Harwood* was liable, on his bond, as surety for the defendant *Thomas Harwood* of *Ben.*; because it is only for that amount the State can claim under the deed of the 7th of April 1810. Therefore it is ordered, that this case stand over with leave to explain and perfect the voucher of the State's claim; and that a copy of this order be sent by mail to the attorney general.

The voucher of the State's claim was corrected, by which it was shewn, that the State was entitled to a prior lien, which was allowed accordingly.

(*t*) Jones *v.* Jones, ante, 443.

PHILLIPS *v.* SHIPLEY.

There is no legislative enactment relative to the reference of suits depending in Chancery to arbitration. Such a reference cannot be withdrawn or revoked without the sanction of the court. There must be a decree upon an award which is fair and unambiguous upon its face; and as to which there is no proof of malpractice, &c.

This bill was filed on the 25th of January 1828, in Baltimore County Court, by *Isaac Phillips* jun'r. and *William Shipley* jun'r. against *Richard A. Shipley*, to have an account of a joint concern, in which they had been engaged, in building certain houses in the city of Baltimore; and for relief, &c. On the same day, and without any answer having been put in by the defendant, it was, by consent, ordered, that the matter in dispute be referred to the arbitrament of *Daniel Kreber*, *Joseph Jameson*, and *Henderson P. Low*, or any two of them. On the 31st of May following the arbitrators, *Jameson* and *Low*, made and returned an award.

The plaintiffs filed a *caveat* or exceptions against the passing of any decree upon this award, in which they assign various reasons; chiefly, that they had revoked the authority of the arbitrators before the award was made; that it was uncertain and ambiguous upon its face; and that it was obtained by fraud and malpractice in the arbitrators who made it. After which the parties filed sundry affidavits in relation to these exceptions; and on the 8th of July 1828, under the act of 1824, ch. 196, the proceedings were removed to and filed in this court.

18*th November*, 1828.—Bland, *Chancellor*.—This case standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

It is quite obvious, that the acts of Assembly which allow cases to be referred to arbitrators relate only to actions *depending* in a court of *common law*;(*a*) and whether the English statute relative to the determining of differences by arbitration ever was in force here does not appear to have been clearly ascertained.(*b*) But even if that statute were to be taken as a part of our law, it is yet doubtful whether it could be executed in cases to which it was

(*a*) October 1778, ch. 21, s. 8 & 9; 1785, ch. 80, s. 11.—(*b*) Kilty Rep. 9 & 10, Will. 3, c. 15; West *v.* Stigar, 1 H. & McH. 247, & 4 H. & McH. 490.

intended to apply, according to the equitable jurisdiction of the Court of Chancery or not.(c) Apart however from that doubt, it is clear, that awards made on references in cases *depending* are not awards to which that statute relates.(d) Whence it is evident, that an award made on a reference in a suit in equity has not been regulated by any legislative enactment whatever; yet it has at all times been held by the courts of common law and equity in England, to be within the regular scope of their powers to pass an order, with the consent of the parties to any suit then depending, referring the matter in controversy to arbitration; and to enforce the award.(e)

The reference of cases depending in this court to arbitration, and the passing of decrees upon awards was common before the revolution,(f) and has continued to be the practice ever since. Whether there has been any well established and regular course of proceeding, in relation to such references, does not distinctly appear; but, it seems, that if the award be in any respect exceptionable, it may, on motion, and on the fact being sufficiently shewn, be set aside.(g) It is presumed, that this court would set aside an award returned to it, upon any ground allowed to be taken against an award in a court of common law; or upon any other ground, on which a bill might be filed between the same parties to have an award vacated.(h) But if no objection be made against an award, then, according to a long standing rule and practice, either party may apply for and have a decree passed in conformity to its terms.(i)

Upon the general principles by which this court is governed, and by analogy to the express provisions of the acts of Assembly regulating similar references in actions at common law, a party cannot be permitted to withdraw from or to revoke a reference made by an order of this court, with the consent of parties, without the sanction and order of this court itself allowing it to be done.(j)

(c) 2 Mad. Chan. 712.—(d) Lucas v. Wilson, 2 Burr. 701; Lansdale v. Littledale, 2 Ves. jun. 453.—(e) Lucas v. Wilson, 2 Burr. 701; Dick v. Milligan, 2 Ves. jun. 24, 2 Fow. Exch. Pra. 350.—(f) Waring v. Mullan, 1771; Chan. Pro. lib. W. K. No. 1, fol. 6, 28, 48, &c.—(g) Nevan v. Pinkney, 1787, Chan. Pro. lib. S. H. H. letter B. fol. 6. (h) Goldsmith v. Tilly, 1 H. & J. 361; Harris v. Dorsey, 1 H. & J. 416; Cromwell v. Owings, 6 H. & J. 10; Heuitt v. The State, 6 H. & J. 95.—(i) Brawner v. Gordon, 17th March 1789, Chan. Pro. lib. S. H. H. let. B. fol. 597; Hardy v. Howard, MS. 16th July, 1794.—(j) Crawshay v. Collins, 1 Swan. 41; Harcourt v. Ramsbottom, 1 Jac. & Walk. 491.

In this case there has been no such regular and solemn revocation. The award returned appearing to be sufficiently fair and unambiguous upon its face to afford a proper foundation for a decree ;(*k*) and the affidavits read in evidence being entirely too loose and contradictory to sustain the allegation of malpractice in the arbitrators ; the *caveat* must therefore be overruled and the award confirmed.

Whereupon it is *decreed*, conformably to the said award, that the property in the proceedings mentioned situate in Pratt-street in the city of Baltimore be held as the property of *William Shipley* jun'r. and *Isaac Phillips* jun'r. and their legal representatives and assigns, as tenants in common ; and it is further ordered, that the property in the bill mentioned situate in Saratoga-street in the city of Baltimore be held by the said *William Shipley* jun'r, *Isaac Phillips* jun'r. and *Richard A. Shipley*, their legal representatives and assigns, as tenants in common ; and it is further ordered, that the property on Franklin-street in the bill mentioned be held as the sole and exclusive property of the said *Richard A. Shipley*, his legal representatives and assigns. And it is further ordered, that the said plaintiffs *William Shipley* jun'r. and *Isaac Phillips* jun'r. pay unto the said defendant *Richard A. Shipley* the sum of three hundred and fifty-five dollars and eighty-nine cents, with legal interest thereon from the 31st day of May last until paid. And it is further ordered, that each party pay his own costs to be taxed by the register ; but the costs of the award, as estimated by the arbitrators and endorsed on the back of the award, are hereby rejected as forming no part thereof.

(*k*) Tillard *v.* Fisher, 3 H. & McH. 118.

IGLEHART *v.* ARMIGER.

The vendor's equitable lien an incident to a contract of purchase: its peculiar nature and character: two equitable liens upon the same estate may well exist together.

An equitable lien, not being assignable in its nature, is extinguished by the assignment of the bond or note given for the payment of the purchase money.

An assignment or bequest of debt carries with it all the securities.

The assent of parties cannot authorize the passing of a decree for which the case set forth in the bill affords no sufficient foundation.

This bill was filed on the 30th of September 1828, by *James Iglehart*, *Robert S. Bryan*, and *William McParlan*, against *Benjamin Armiger*, *Richard G. Hutton*, *Richard D. Hill*, *Rezin Estep*, *John S. Selby*, and *Nicholas I. Watkins*. The object of the bill was to have a tract of land which had been sold by the plaintiff *Iglehart*, as trustee under a decree of this court, and purchased by the defendant *Armiger*, resold for the payment of the balance of the purchase money; on the ground, that the equitable lien of the vendor still subsisted in full force and unimpaired. The bill stated, that the bonds, taken by the trustee *Iglehart* to secure the payment of the purchase money, had been assigned, and were then held by the plaintiff *McParlan*, as the assignee thereof; and, that the defendants *Selby* and *Watkins* had agreed to guaranty their payment. Whereupon the plaintiffs prayed, that the land might be sold for the payment of the balance of the purchase money which had been secured by those bonds, and for general relief.

The defendants, *Selby* and *Watkins*, by their answer, admitted the facts as stated in the bill; but insisted, that a decree should pass, in the first instance, for the sale of the land; because they were, by their guaranty, only responsible upon an eventual deficiency of the land and the persons bound before them.

None of the other defendants having appeared, as required by the *subpœna* which had been served on them, an interlocutory decree was, on the 11th of December 1828, passed against them, and a commission issued, under which testimony was taken and returned. Upon which the case was submitted.

10*th January*, 1829.—Bland, *Chancellor*.—This case standing ready for hearing, and having been submitted on the notes of the plaintiffs' solicitor, the proceedings were read and considered.

The circumstances and facts are these. *Joseph Selby* died intestate, seized of a certain tract of land which descended to his

children. One of whom, *Jemima*, with her husband *John Cross*, and others, filed a bill in this court, alleging, that the estate, which had so descended to them, would not admit of partition without loss; and therefore prayed, that it might be sold and the proceeds divided among them. It was decreed accordingly, on the 12th of December 1816; and *Thomas Sellman* was appointed trustee to make the sale. In pursuance of which authority he reported, that he had sold the property to *John Cross*, who had given bond as required for the purchase money; and, on the 29th January 1817, an order was passed to confirm the sale unless cause shewn. On the 8th of March following *John Cross*, the purchaser, died intestate, and without having paid the purchase money, leaving three minor children, his heirs, to whom the real estate so purchased descended.

The minor heirs of *Cross*, by their next friend, petitioned the legislature for a special act, authorizing the sale of the interest so purchased by their father, in order to save the fee simple estate which had descended to them, and also the personal property, agricultural implements, &c., which were necessary for their support: alleging, that the Chancellor, on application, had declared it to be his opinion, that he had no authority to decree in such case: that is, as is presumed, that he had no authority to decree, at their instance, that the assets should be so marshalled; and upon this ground, as it seems, the legislature, on the 20th of January 1818, passed an act,(*a*) authorizing *Thomas Sellman* as trustee to sell, at public sale, upon such terms as the Chancellor should direct, all the equitable interest in the real estate which had so descended to the minor children of the late *John Cross;* and, from the proceeds, to pay the purchase money; and the balance to be disposed of as the Chancellor should direct; or to pass to those children as realty; and, if *Sellman* the trustee should die, the Chancellor was authorized to appoint a successor.

In pursuance of this act of Assembly, *Sellman*, on the 27th of the same month, filed his petition to the Chancellor, who, on the same day, passed a decree accordingly specifying the terms of sale. Upon which *Sellman*, on the 6th of October 1818, made a sale of the equitable interest of the children of *Cross* to *Benjamin Armiger*, by whom a part of the purchase money was paid, and the residue secured by bonds and a note with surety, which were

(*a*) 1817, ch. 46.

made payable "to *Thomas Sellman* trustee for the sale of the real estate of *John Cross* deceased." After which, and before he had reported the sale, *Sellman* died, and *James Iglehart* jun'r. was appointed to succeed him as trustee; who made a report of the sale, and that he had the money received and also the bonds taken then in his hands. This sale was finally ratified on the 19th of March 1819; and, by an order of the 28th of April following, the proceeds were made payable to this same *James Iglehart*, who was also appointed trustee in the place of *Sellman* under the decree of the 12th of December 1816, leaving a balance still due from the late *John Cross's* estate to the late *Selby's* estate, as shewn by the statement taken from the report of the late *Thomas Sellman*, who had made and reported a sale under the decree in that case, which had not been finally ratified until the 27th of January 1818.

In which suit, for a partition of the late *Joseph Selby's* estate, the auditor, on the 1st of April 1818, made and reported a statement of a distribution of the proceeds of sale, allotting one share of the estate of the late *Joseph Selby* which had been sold to *John Cross*, to the said *John* and *Jemima* his wife, which was ratified on the same day. On the 29th of April 1819 *Iglehart* the trustee, by petition, applied to be directed as to whom the share awarded to *John* and *Jemima* was to be paid. Upon which the Chancellor passed the following order.

"1*st May*, 1819.—Kilty, *Chancellor*.—On considering the within application, I am of opinion, that the part of the proceeds of *Joseph Selby's* estate, allotted to *John Cross* and *Jemima* his wife, is to be paid to *Jemima Cross*, who has survived *John Cross*, inasmuch as it was not received, or assigned, or applied by him in his lifetime. Having been the purchaser, if he had settled up the other parts, he might have settled his proportion with the trustee by discount, or possibly might have settled that part only with him. The case must now be considered, as to her right, in the same manner as if any other person had been the purchaser.(z) But the trustee, in paying the parts allotted under the orders of the 1st and 29th of April 1819, must pay only a rate or proportion to each, according to the net sum received from the sale of *J. Cross's* real estate, until he recovers the balance on his bond. The present trustee is allowed one-third of the commissions of 182 dollars, paying two-thirds to the representatives of *T. Sellman*."

(z) Jones v. Jones, ante, 454.

Two of the bonds which had been taken from *Armiger*, after several partial payments on them, were, on the 28th of December 1824, by *James Iglehart*, as trustee for the sale of the real estate of *John Cross* deceased, assigned to *John S. Selby* one of the heirs of the late *Joseph Selby*, and to whom a portion of his estate had been awarded by the auditor's report, and the order thereon of the 1st of April 1818. And, by *Selby*, these bonds were assigned to *Robert S. Bryan*; and, by him assigned to *William McParlan*. *Nicholas J. Watkins* and *John S. Watkins* undertook to guaranty the payment of these bonds. Upon all which this bill was filed.

It was urged, that the equitable lien held by the court, arising from the sale under its decree, or by the late *Thomas Sellman*, and his successor, as trustee under the act of assembly, was assignable in its nature; that it has been assigned; that it was necessarily associated with the bonds given by the purchaser *Armiger*, and his sureties, and virtually passed along with the assignment of them from *Iglehart* to *Selby*, to *Bryan* and to *McParlan*.

An *equitable lien* is one of a very peculiar character. It is not like the common law lien of factors, innkeepers and others, associated with and entirely dependent upon the actual possession of the property on which it is a tie; it is not like a general judicial lien, which springs into existence in favour of a party who obtains a judgment, which enables him to take the lands of the defendant in execution, and continues as an incident to such unsatisfied judgment to which the statute has expressly made all the lands of the defendant liable; it is not like the lien of the State upon the property of its debtor, founded as well on positive enactment as on principles of common law, by which the interests of individuals are postponed in favour of those of the public; it is not precisely of the nature of the lien given by the civil law to those called privileged creditors, such as nautical salvors, material men, &c.; nor is it altogether like a common mortgage, although it operates and is treated, in many respects, as a mortgage. It differs from all these in this, that, if it exists at all, it must originate with, and as an incident of the contract of purchase itself; that it is not always a part, or principle of the contract as in the case of a lien given by the civil law, to privileged creditors; that it is not founded on any express stipulation; that it is not dependent on having possession; that it is not deduced from any statute; and that it does not rest on any general principles of common law.

This doctrine in relation to equitable liens, it is said, has been

probably derived from the civil law as to goods,(*b*) and it seems, that such a lien upon goods is a personal right which cannot be transferred to another.(*c*) But in whatever way it may have originated, it is now well settled, that an equitable lien arises from the principle of equity, that the purchaser of real estate ought not to be allowed to hold it, as his own, until the vendor has been fully satisfied; and that it is a *vendor's* security and privilege. It is indispensably necessary to the existence of such a lien, that the parties should stand in the relation towards each other of *vendor* and *vendee* of real estate, the purchase money of which has not been fully paid. If that relationship is, in any manner whatever, put off, altered, or relinquished, an equitable lien either cannot arise, or will be destroyed. The pure relationship of creditor and debtor, or of borrower and lender, is incompatible with the existence of an equitable lien, excludes, or extinguishes it. In a contract of loan, the relation of creditor and debtor attaches independently of any securities for the payment of the money, such as a mortgage, bond, or note: which, when given, are the mere accidental circumstances of a contract in all respects complete without them. The chose in action is assignable in its nature, in equity at least, independently of those evidences and securities of it. But in a purchase of real estate payment is an essential part of the contract; hence it is an established principle of equity, that the vendor holds a lien upon the estate to secure the payment of the purchase money; and this lien is an incident uniformly arising from, and associated with such a contract.(*d*) It exists in all cases, unless a manifest intention, that it should not exist, appears;(*e*) and it continues until it has been, in some way, impliedly or positively waived; all which it lays upon the vendee to shew.(*f*)

In the case of a purchase of a real estate the equitable lien arises as an incident thereto, and can only exist together with it, as principal and incident. In the case of loan the debt is the principal, and the bond, note, or mortgage are only the accidents or incidents to it. In both cases the extinguishment of the principal destroys its incidents. A purchase may be made, or a debt may exist without an equitable lien, or a bond, note, or mortgage

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(*b*) Mackreth *v.* Symmons, 15 Ves. 344; Walker *v.* Preswick, 2 Ves. 622. (*c*) Daubigny *v.* Duval, 5 T. R. 606.—(*d*) *Ex parte* Gwynne, 12 Ves. 379.—(*e*) Mackreth *v.* Symmons, 15 Ves. 341.—(*f*) Mackreth *v.* Symmons, 15 Ves. 330; Sug. Vend. & Pur. 386; Pow. Mort. 1062.

as its incident. A bond, note, or mortgage may however be executed as being, in itself, the creator, evidence, and incident of a debt; but an equitable lien cannot be thus made and executed apart from, and independently of a contract of purchase, or as being, in itself, the evidence of a purchase. Hence, it is perfectly evident, that a bond, note, or mortgage may be, in itself, at once the principal and incident; it may create a debt, and thus establish the principal of which it is the evidence and incident; but an equitable lien is so purely an incident, that it cannot be called into existence in any other manner than as an attendant upon a contract of purchase; and when that is satisfied or substantially waived, the equitable lien is gone.

It is true, as a general rule, that the principal carries with it all its incidents, but not the reverse. *Accessorium non ducit, sed sequitur suum principale.*(*g*) And therefore if the debt be in any manner distinctly and legally assigned; the assignment carries with it the bond, note, or mortgage as its incident; because the transfer of the money carries with it the mortgage interest in the land, and all other securities which were given for the purpose of assuring its payment. This may be done by parol notwithstanding the statute of frauds. So too, if it be the intent of the mortgagee to give the debt only, he may do so by a will not attested by three witnesses; and the legatee may in the name of the heir obtain, in equity, all the benefit of the mortgage: but if his intention was to devise it as land, then his will must be duly attested for that purpose. The reason of this is, that a gift, assignment, or bequest of the principal carries with it all its beneficial incidents.(*h*)

But an equitable lien is an encumbrance upon land, which can only be held by a vendor; and although assets may be marshalled, so as to put a vendor altogether upon his equitable lien, for the benefit of other creditors, yet no third person can, as assignee of the vendor, derive any benefit from such lien;(*i*) nor can it, like a bond or mortgage, be assigned; because it is not expressed in writing, or in any separate contract; but exists only as an inseparable equitable incident of the contract of purchase; and is raised by construction of equity, in favour of the vendor only. To allow it to pass by an assignment of the claim for the purchase

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(*g*) Co. Litt. 151, 152; 2 Blac. Com. 176.—(*h*) Green *v.* Hart, 1 John. Rep. 580; Jackson *v.* Willard, 4 John. Rep. 41; Runyan *v.* Mersereau, 11 John. Rep. 534; Martin *v.* Mowlin, 2 Burr. 978; Pow. Mort. 140, 144, 266, 429.—(*i*) Mackreth *v.* Symmons, 15 Ves. 329, note; Sug. Vend. & Pur. 395.

money; or by a transfer of the bonds, or notes, given as a security for the payment of the purchase money, would be of the most ruinous consequence to titles to real estates. It would completely break down the statute of frauds, and all the acts of Assembly requiring conveyances of lands to be recorded; according to which acts no estate for above seven years in any land shall pass or take effect, unless the written conveyance, by which it is made, be within six months thereafter put upon record, and thus made accessible to all concerned. A common bond, or a mere promissory note passing with a blank endorsement from hand to hand, might carry with it an incumbrance upon a real estate of the most binding and extensive nature. Besides, if such assignable or negotiable instruments were permitted to carry with them any such equitable lien, aliens and others, incapable of directly taking any such estate, might thus acquire and hold a much larger interest in land than is allowed by our law.(*j*) This certainly ought not to be permitted; and there is no authority sanctioning any such principle.(*k*)

But where there has been a bond or promissory note given for the payment of the purchase money, which does not impair the equitable lien, the assignment of such security must operate as a tacit relinquishment of the equitable lien; because the assignee and vendee are thereby placed in the relationship of creditor and debtor; and the vendor having thus finally waived the right to enforce his equitable lien, it can never again be revived in his favour; unless his privilege as vendor has been kept up and continued by the holding of him answerable as assignor of the securities given for the payment of the purchase money.(*l*)

Although it is admitted, that no adjudged case can be found in the English books to sustain the position, that an equitable lien may be assigned, or that it virtually passes along with the assignment of the bonds given for the payment of the purchase money: yet it is said, that the principle has been sanctioned by the decisions of this court.

The case principally relied on is, that of *Brewer* and *Mackubin* v. *Nicholls*, 8th July 1824. In that case *Arnold* was the vendor; and he, as such, transferred to *Brewer* and *Mackubin* all the interest he held in the land, subject to *Nicholls's* contract as vendee; and

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(*j*) 1784, ch. 58; Hughes *v.* Edwards, 9 Wheat. 496.—(*k*) Sug. Vend. & Pur. 396.—(*l*) White *v.* Williams, 1 Paige, 502; Wilson *v.* Graham, 5 Mun. 297.

also transferred to *Brewer* and *Mackubin* the debt due from *Nicholls* to him: to which assignment *Nicholls* was privy and assented. By virtue of all which *Brewer* and *Mackubin* became, in fact, the vendors to whom *Nicholls* the vendee stipulated to pay the purchase money. The whole contract and relationship of vendor and vendee were thus passed over to the new parties, and therefore it was held, that the assignment with the express assent of all the original parties carried with it the incident equitable lien.(*m*) But, in the case under consideration, it is not pretended, that any of these assignees were ever, in any manner or form, to be considered as the vendors; or that the interest in the land had been assigned to them subject to *Armiger's* contract. These assignees merely took the *chose in action* with the bonds as the evidence of it; and now contend, that the assignment so made to them has, in itself, given to them the equitable lien originally held by the vendor. These cases are materially different, and the one cannot in any manner be applied to sustain the position now contended for in the other.

The case of *Hollingsworth* v. *Bowie* and others, 20th June 1824, has also been relied on. But no reasons were given for the decision, and it seems to me, that the judgment of the Chancellor must have been founded, not upon the assignable nature of an equitable lien, but upon the ground, that *Ray*, the surety of *Bowie* the vendee, with *Barber*, the holder of the note, had a right to be substituted in the place of the vendor.(*n*) The case of *Randall* and others *v. White* and others, 3d August 1825, has also been spoken of. But it does not appear, that any such question, as that of the assignable nature of an equitable lien, could well have arisen in it; and I am confident, no such point was ever made in that case.

It will be proper, however, to recollect, that this land has been twice sold under the authority of this court; first, under the decree of December 1816, by which the court reserved the legal title with an equitable lien as against the purchaser *John Cross;* and secondly, under the decree of January 1818, by which the equitable estate of *John Cross* was sold with the reservation of an equitable lien as against the purchaser *Benjamin Armiger.* A doubt has been expressed whether an equitable lien can arise as an incident to the

(*m*) Mackreth *v.* Symmons, 15 Ves. 330.—(*n*) Ghiselin *v.* Ferguson, 4 H. & J. 522; White *v.* Williams, 1 Paige, 502.

sale of a mere equitable interest,(*o*) such as that sold to *Armiger*. But I can see no ground for any such distinction between the sale of a legal and an equitable estate. The lien is given to the vendor, not because of the quantity of interest, or the nature of the estate sold; but, because it would be unjust that the purchaser should hold that absolutely for which he had not paid; and because, until the whole purchase money has been paid, the contract of purchase cannot be considered as complete. Now these reasons apply as obviously, and as satisfactorily to the sale of an equitable as to the sale of a legal estate. The existence of two equitable liens upon the same real estate can be in no respect more incompatible than the contemporaneous existence of two encumbrances of any other description. They must be permitted to take according to their priorities and other equities, as usually adjusted by this court. There may be, perhaps, no case like this to be found in the English books; but it has often occurred in this court, that an equitable lien has been held to arise on a sale of a mere equitable estate, which lien has been enforced accordingly.(*p*)

There is then nothing in the authorities adduced, which shews it to have been held by this court, either that an equitable lien was in any manner assignable unconnected with the land itself which was the subject of the contract of purchase; or that an assignment in any form of the bond or note given to secure the payment of the purchase money carries with it the equitable lien held by the vendor or assignor of such bond or note.

I will here take occasion to repeat, that, in all sales under a decree, the court itself must be considered as the vendor; since the contract is made with the court, through the instrumentality of its trustee or agent, for the benefit of all concerned.(*q*) And consequently, the equitable lien, thus held by the court, may, and has always been treated as such a lien would be considered if held by a natural person; but which can in no manner whatever be affected by any act of the trustee not expressly sanctioned by the court itself. The powers and duties of a trustee are always specified in the decree, or orders by which his acts are directed. He was, in this instance, directed to collect and distribute the purchase money, by the order of the 1st of April 1818, and by the act of

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(*o*) Bayley *v.* Greenleaf, 7 Wheat. 50.—(*p*) Ghiselin *v.* Fergusson, 4 H. & J. 522; Pinkney *v.* Mayo, MS. 19th April 1814, & 14th April 1821.—(*q*) Savile *v.* Savile, 1 P. Will. 747; *Ex parte* Minor, 11 Ves. 561.

1817, ch. 46. But it does not appear, that he was in any manner authorized to assign the bonds; and therefore, I do not see upon what ground he now assumes the right to appear here as a plaintiff, and tell this court of his unauthorized dealing with its business. But suppose the court could have so ordered by the provisions of the act of 1817, ch. 46, and he had been directed to assign those bonds, that assignment would not have carried with it a lien upon the land until they were paid; or any right to resort to him, or the court, in case they had not been paid after the assignee had used due diligence to recover the amount secured by them.(*s*) The acts of Assembly giving a lien in certain cases, in connexion with the bond given by the purchaser, afford strong evidence, that it never has been considered as following any such assignment where it was not expressly given by law.(*t*)

But it is urged, that a decree may be entered up by the default of some, and with the assent of the others of these defendants; and therefore, the plaintiffs may be permitted to take such a decree as they can abide by. That might be conceded if the case itself, as shewn by the bill, was such an one as fell properly under the cognizance of a court of equity. That the court has jurisdiction, and that the plaintiff has a legal capacity to recover, upon the facts stated in the bill, are positions assumed; and must plainly appear, by the bill itself, in all cases, to entitle the plaintiff to a decree, in any form or upon any terms; and to lay a sufficient foundation upon which the court may rest its judgment. Consent either tacit or express cannot give the court jurisdiction where it has none; or entitle the plaintiff to relief, where, by his own shewing, it appears he has no capacity to receive it. Thus far, and to this purpose all courts of justice, as well of law as of equity, must see, that their judgments and decisions have a proper and legal foundation to rest upon.(*u*) But, divesting these plaintiffs of their unwarranted pretensions to be considered as the holders of the equitable lien of the original vendor, their case has no one single ingredient or character of equity about it. Their remedy, if any, is at law as assignees of the bonds, or upon the special contract subsisting among the parties.

Whereupon it is decreed, that the bill be dismissed with costs, &c.

(*s*) 1785, ch. 72, s. 9.—(*t*) 1820, ch. 191, s. 20, 21, & 22.—(*u*) Bac. Abr. tit. Pleas & Pleadings, B. 5, 1; Dr. Bonham's Case, 8 Co. 239; Clarke *v.* Conn, 1 Mun. 160.

MURPHY *v.* DALLAM.

A devise of land to a religious sect without the leave of the legislature, in some way previously had and obtained, is void.

This was a creditors' bill filed on the 17th of November 1824, by *John Murphy* against *Henrietta M. Dallam*, *William M. Dallam* and others, the widow, executors and devisees of *Josias W. Dallam* deceased; upon which a decree was passed on the 8th of February 1826, and the real estate of the deceased was sold accordingly. After which the auditor, in his report of the 29th of October 1828, making a distribution of the proceeds of the sales among the creditors, &c., says, that he had made no allowance to *John Murphy*, who was a purchaser under the decree, for the lot claimed out of the property sold to him, by the Methodist society in virtue of a devise in the will of the deceased. Independently of other objections, the devise would be void as against creditors.

12*th January*, 1829.—Bland, *Chancellor*.—It appears by the will of the late *Josias W. Dallam*, that he devised one-fourth of an acre of his lands, as described, to *Francis Asbury* for the use of the Methodist society and a school. It is not shewn, that this society ever obtained the leave of the legislature, in any manner whatever, to take or hold this property. The act of 1802, ch. 111, authorizes any religious society to form themselves into a body politic, and the 8th section of that act, and the act of 1815, ch. 222, authorizes such corporations to take and hold a certain amount of property. But it has not been shewn, that the Methodist society to whom this devise was made had formed themselves into a body politic, and thus became qualified to hold this property by virtue of this general leave of the legislature.(*a*) Therefore I am of opinion, that this devise must be considered as absolutely null and void by virtue of the 34th article of the Declaration of Rights; and upon that ground the claim of the society has been properly rejected.

(*a*) By the act of 1791, ch. 17, it was enacted, "that the leave of the legislature be hereby granted to the said religious society of people called Quakers, to enjoy for ever the use of the said land in East Nottingham, and West Nottingham; provided the Chancellor, on examination, shall find the facts above stated to be true," &c. This appears to be the first act of the kind, passed in pursuance of the 34th article of the Declaration of Rights.

Whereupon it is ordered, that the foregoing statement as made and reported by the auditor be and the same is hereby ratified and confirmed; and the trustee is directed to apply the proceeds accordingly, making payment to the said claimants or to their respective solicitors, with a due proportion of interest that has been or may be received, except claims No. 3, 17, and 28, which are suspended until further order.

WATKINS *v.* DORSETT.

An executor or administrator who overpays takes the place of the creditor whose debt he pays, and is entitled to the benefit of his priority.

The principle of the statute of limitation may be applied in favour of a plaintiff as well as of a defendant.

The act of assembly which gives the process of a judicial attachment applies only to courts of common law.

Choses in action, and several other kinds of property are beyond the reach of a *fieri facias*.

This bill was filed on the 29th of January 1827, by *Samuel Watkins*, *Augustus Watkins*, *Charles Watkins*, *Ann Watkins*, *Jane Watkins*, and *Eliza Watkins*, infants, by *Benjamin Watkins* their next friend, against *Thomas J. Dorsett*. The bill states, that *Samuel W. Clagett*, by his will, made on the 21st of July 1815, bequeathed certain negro slaves to the infant plaintiffs, and appointed *Walter Clagett* his executor; that *Samuel* died soon after, and *Walter*, having taken upon himself the office of executor, returned an inventory of his testator's personal estate on the 3d of June 1817; and on the 9th of April 1819 passed a final account, in which he is represented to have paid in satisfaction of claims against his testator the sum of $343 18 more than the amount of moneys received by him; that, soon after the settlement of this final account, he transferred and delivered to the legal guardian of these infant plaintiffs, for their use, the several specific legacies which had been bequeathed to them by his testator; and acknowledged himself to be perfectly satisfied and paid; that afterwards, in the year 1819 or 1820, *Walter Clagett* died; and the defendant, who had married his daughter, and was thus interested in having this alleged claim against the testator *Samuel* established,

had obtained letters of administration *de bonis non* on the estate of the testator *Samuel W. Clagett*, and had advertised for sale, and was about to sell those very slaves, which had been so specifically bequeathed and delivered to these plaintiffs. The plaintiffs, by their bill, averred, that no debt was then due on the final account of the late *Walter Clagett;* that it had been satisfied; that no suit had ever been instituted to establish it; and that it was barred by the statute of limitations. Whereupon the plaintiffs prayed, that they might have an injunction to prevent the defendant from making sale of the property so bequeathed to them; and that they might have relief, &c. The injunction was granted as prayed.

The defendant put in his answer, in which he admits the facts as stated in the bill; but denies that the claim had ever been paid; and insists, that it could not be barred by the statute of limitations, as there had not been, until he administered on the estate of *Samuel W. Clagett*, any one against whom suit for its recovery could have been brought; and that it was with him alone to admit or deny the existence of the debt.

Upon this answer the defendant gave notice of a motion to dissolve the injunction: on the hearing of which on the 17th of March 1827, it was continued until the final hearing or further order. After which a commission was issued, under which testimony was taken and returned, and the case set down for final hearing.

30*th July*, 1828.—Bland, *Chancellor.*—This case standing ready for hearing, the solicitors of the parties were fully heard and the proceedings read and considered.

The object of this bill is not to repel a claim made by the executor of *Walter Clagett* against these plaintiffs; but to restrain the defendant, as administrator *de bonis non* of *Samuel W. Clagett*, from officiously making sale of that which had been the property of his testator, (but which had, long since, been legally delivered over to these plaintiffs to whom it had been bequeathed,) for the purpose of paying the claim, which *Walter*, by reason of his over payment, as is alleged, had against the estate of his testator *Samuel.*

An executor who overpays is allowed, for such amount, to take the place of the creditor whose claim he has thus paid beyond the assets of his testator. He is, by substitution, regarded as one of the creditors of his testator: but such executor must establish the claim so overpaid against the heir or devisee by the same kind of testimony which might have been required of the original

creditor himself.(*a*) Had *Walter Clagett*, who thus became a creditor of *Samuel W. Clagett*, made this claim; the circumstance of his having delivered up the surplus, and the great length of time which had elapsed, from the delivery on the 9th of April 1819 until the institution of this suit, without accounting for the unqualified manner of the delivery, and the delay, would have been considered as a complete bar. But, in this case, the statute of limitations, as such, cannot properly be applied; because, that statute is a defence given to a debtor against a creditor; and here it is not the creditor himself who makes the claim. Yet the result of what this defendant claims a right to do would be the same as if the executor of *Walter Clagett* were here, as plaintiff, asking payment and to have his claim sustained against these parties as defendants. And, consequently, whatever defence they would, in such case, be permitted to make, they ought, as plaintiffs, to be allowed to have the benefit of in the form in which the matter is now presented, at least so far as to bind this defendant.

I am therefore of opinion, that the circumstances, and lapse of time raise a conclusive presumption, that this claim of *Walter Clagett* either never existed or has been satisfied.

Whereupon it is *decreed*, that the injunction heretofore granted in this case be and the same is hereby made perpetual; and it is further decreed that the defendant pay unto the plaintiffs their costs to be taxed by the register.

(*a*) Robinson *v.* Tonge, 3 P. Will. 400; Gist *v.* Cockey, 7 H. & J. 139.

Ex parte Street.—This petition was filed by John Street on the 3d of April 1806, under the act of 1785, ch. 72, s. 4, stating, that John Cook deceased had devised his land to be sold for the payment of his debts without authorizing any one to make the sale; that the personal estate of Cook had been exhausted; and that the petitioner, as his executor, had paid debts to a much greater amount than the assets which came to his hands. The real estate was accordingly decreed to be sold. After which the case having been brought before the court for further directions, as to the distribution of the proceeds of sale among the creditors:

17*th June*, 1809.—Kilty, *Chancellor*.—The rule as stated by the auditor, of giving a priority to claims against the deceased to those which arise to the executor from an overpayment of the personal estate, was established by the late Chancellor. It has been departed from since, in cases where such overpayment was made on account of a judgment or other lien; even so far as to put the executor in the place of such creditor to the extent of his lien. In the present case the overpayment does not appear to have been made expressly on account of any such judgment; but inasmuch as there were claims on judgments paid by the executor exceeding the amount of the overpayment, and the other claims now exhibited are not entitled to any preference, it is thought proper to let the executor's claim come in equally with others.

Upon this decree the plaintiffs demanded of the defendant payment of their costs, which he failed or refused to pay. After which by their petition they stated, that they knew of no property which belonged to the defendant, excepting what might be reached by an attachment under the act of 1715, ch. 40, s. 7, and therefore prayed that such an attachment might be granted to them.

12*th January*, 1829.—Bland, *Chancellor*.—The solicitor of the plaintiffs having been heard in support of their petition, the proceedings were read and considered.

This petition exposes one of the still subsisting deficiencies of our code. It may be inferred from the general spirit of our laws, that all the property of a debtor, of every description, should be liable to be taken by his creditors in satisfaction of their claims. By the common law, the personal property of the debtor, with the rents and profits of his real estate only, were liable; but by statutes derived to us from England, with some additional legislative enactments of our own, the real estate of a debtor has been subjected to be taken in execution by *fieri facias*, or attachment, and sold for the satisfaction of his debts in like manner as his personal property.(*b*) There are, however, still several kinds of property, which a debtor may hold, laying beyond the reach of his creditor's execution.

Public stock, the stock of banks, of turnpike road companies, and the like, cannot be taken in execution under a *fieri facias*, nor can *choses in action* be made liable to creditors at common law,(*c*) otherwise than by an original or judicial attachment;(*d*) but the acts of Assembly, which direct the manner of suing out attachments, have in express terms treated them as process ancillary to the judicial powers of the courts of common law only; have authorized the use of them by any individual *inhabitant* of the United States who may be entitled to sue here; and have limited the extent of them to the taking of the lands, tenements, goods, chattels, and credits of the debtor in cases at common law only.(*e*) In England it is laid down, that *choses in action*, stock, debts, &c. are not liable to creditors; and that they cannot be taken on a *fieri facias*, or under a sequestration from chancery,

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(*b*) 5 Geo. 2, c. 7; 1810, ch. 160; Ford *v.* Philpot, 5 H. & J. 315; Barney *v.* Patterson, 6 H. & J. 182.—(*c*) Harding *v.* Stevenson, 6 H. & J. 267.—(*d*) Ford *v* Philpot, 5 H. & J. 317.—(*e*) 1715, ch. 40; 1795, ch. 56; 1825, ch. 114.

or be at all touched in equity for the benefit of creditors.(*f*) The reason, it is said, why *choses in action*, according to the general rules of the Court of Chancery, are not liable to execution is, because the court takes notice, that the creditor has a method, by the ordinary rules of law, either to compel satisfaction, by seizing the person; or, where the person cannot be taken, by proceeding to an outlawry and taking the lands as well as effects into the hands of the king, which, as of course, are then applied in satisfaction of creditors.(*g*) Now, as it is evident, that our process of attachment is, in many respects, equivalent to this mode of obtaining satisfaction by means of an outlawry, which was never in use here, and as this court must take notice of the remedy by attachment, it may well be held, that a creditor cannot be permitted to come here for relief in any case where he could obtain it by attachment at law. But, where a party cannot obtain relief at all, either by an ordinary execution, or by the extraordinary process of outlawry or attachment by reason of the peculiar situation of the property, or the equitable nature of the title to it, he may obtain relief by bill in equity.(*h*)

But the mode of obtaining relief by bill in chancery must necessarily be comparatively tardy and expensive; and where the fund, thus pursued, consists of mere *choses in action*, the delay may afford to a fraudulently disposed debtor ample time to place it entirely beyond the reach of any process that can be issued by a court of equity; so that, after the creditor had thus obtained a decree in his favour, he would be no nearer to relief than when he began.

I have met with no evidence of any well settled practice shewing, that this court had conceived itself authorized to allow a party to sue out a judicial attachment, instead of any other execution, to obtain satisfaction of a decree.(*i*) Yet I can see no just reason why the process of attachment should not be so enlarged as to compre-

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(*f*) Dundas *v.* Dutens, 1 Ves. jun. 196; Guy *v.* Pearkes, 18 Ves. 196; Franckyin *v.* Calhoun, 3 Swan. 276; Pelham *v.* Newcastle, 3 Swan. 290; McCarthy *v.* Goold, 1 Ball & Beat. 389; Grogan *v.* Cooke, 2 Ball & Beat. 233.—(*g*) Edgell *v.* Haywood, 3 Atk. 356.—(*h*) Edgell *v.* Haywood, 3 Atk. 352; Willis, Plea. 115; Hadden *v.* Spader, 20 John. 554; Ford *v.* Philpot, 5 H. & J. 312.

(*i*) RICKOTT *v.* HIGGINSON.—1720.—*Subpœna* for costs. Mr. Warman, sheriff of Ann Arundel county, comes into court and certifies, that Mr. Gilbert Higginson, the defendant, is not to be found in his bailiwick; but, that he has left the *subpœna* for costs in this cause with Mr. Patrick Sympson, attorney in fact for the defendant. Therefore ordered, that attachment issue in the same manner as is directed out of the courts of common law.—*Chan. Proc. Lib. P. L. fol.* 568.

hend all cases ;(*j*) and be allowed as a means of obtaining satisfaction of a decree in equity as well as of a judgment at common law.(*k*) But this subject appears to have been, some years since, maturely considered by the legislature, who at that time armed the Court of Chancery with all such new and additional process as was then deemed necessary to an effectual exercise of its powers ;(*l*) and the common law process of judicial attachment was not then given.(*m*) I am therefore of opinion, that no such attachment can be awarded as prayed.

Whereupon it is ordered, that the petition of the plaintiffs be and the same is hereby dismissed with costs.

ETCHISON *v.* DORSEY.

If, on a bill for a specific performance, a decree be passed directing the defendant to convey on the payment of the purchase money; there cannot afterwards be a decree ordering the plaintiff to pay the purchase money without a cross bill; although such a reciprocal decree might have been passed in the first instance, had it been called for, without a cross bill.

This bill was filed on the 12th of September 1827, by *Ephraim Etchison*, *Odle Wheeler* and *Caroline* his wife, *Mortimer Dorsey*, *Richard Dorsey*, *Nelson Norris* and *Eliza* his wife, *John Dorsey*, *Caleb Dorsey*, and *John Hood* and *Louisa* his wife, against *Mary*

(*j*) Yerby *v.* Lackland, 6 H. & J. 451 ; Harden *v.* Moores, 7 H. & J. 4.

(*k*) The process of attachment to enable a creditor to obtain satisfaction of his debt, appears, by the acts of 1647, ch. 3, and 1682, ch. 2, to have been engrafted into our code among the earliest formations of its judicial proceedings ; and has been in constant use, with few alterations, ever since. About the year 1705, in a report made by the then ex-chancellor, Lord Somers, to the House of Lords, it was among other things proposed, that " the debts that any defendant hath owing unto him may be attached in execution, in satisfaction for debt and damages recovered against him ; and a day shall be given to the debtor to appear, the court shall give judgment for the plaintiff to recover so much as shall be attached, &c., as in *London* upon a foreign attachment."—*Parke's Hist. Co. Chan.* 274.

Since this decision was pronounced, it has been declared by the legislature, that an attachment may be laid upon debts due the defendant upon *judgments or decrees*, 1831, ch. 321 ; and also that a *fieri facias*, or attachment, may be laid upon any interest which a defendant may have in the capital or joint stock of any corporation, or in the debt of any corporation transferable upon the books of such corporation ; 1832, ch. 307.

(*l*) 1785, ch. 72, s. 25.—(*m*) Shivers *v.* Wilson, 5 H. & J. 130.

Dorsey, *Achsah Dorsey*, *Hanson Dorsey*, *Henry Dorsey*, and *Septimus Dorsey*, all of whom were infants. The bill states, that *Richard Dorsey* sold to the plaintiff *Etchison* a tract of land containing ninety acres, delivered to him the possession, and received a part of the purchase money, leaving a balance of three hundred dollars still due; after which *Richard Dorsey* the vendor died intestate, leaving the plaintiffs *Caroline*, *Mortimer*, *Richard*, *Eliza*, *John*, *Caleb*, and *Louisa*, with the infant defendants, his children and heirs at law; that the plaintiff *Mortimer* had been appointed administrator of the personal estate of his father the late *Richard*. Whereupon the plaintiffs prayed, that the defendants might be required to join in a conveyance of the land sold on the purchase money being paid, &c. The infant defendants answered by guardian and submitted to such decree as might be deemed equitable, &c.

15*th October*, 1827.—Bland, *Chancellor.*—*Decreed*, that on payment by the complainant *Ephraim Etchison* of the sum of three hundred dollars with the interest due thereon to *Mortimer Dorsey* administrator of *Richard Dorsey* deceased, or on bringing the same into this court to be paid to him, being the balance of the purchase money due as stated in the bill; that the other plaintiffs *Odle Wheeler*, &c., for themselves, and that *Ann Dorsey*, as guardian on behalf of the infant defendants, shall by a good deed to be executed according to law, convey to the plaintiff *Ephraim Etchison*, &c. Provided nevertheless, that liberty be and the same is hereby reserved to the infant defendants to shew cause according to the act of 1773, ch. 7.

After which the plaintiff *Mortimer Dorsey* by his petition alleged, that the plaintiff *Etchison* had refused to pay the balance of the purchase money as required by this decree; although the other parties then were and had always been ready to execute the conveyance as directed. Whereupon he prayed, that *Etchison* might be ordered to pay, &c.

19*th February*, 1829.—Bland, *Chancellor.*—The aforegoing petition of *Mortimer Dorsey* having been submitted, the same, with the other proceedings, were read and considered.

On a bill for specific performance, where it appeared by the case admitted or established, that each party was bound to pay money or to perform some act for the benefit of the other, the court, by the ancient practice, could only decree in favour of the plaintiff, leaving the defendant to obtain that to which he was entitled by a

cross bill. But according to the present course of proceeding, as well in England as in Maryland, the court may if called on dispense with a cross bill, and pass a decree upon the whole case, as well in favour of the defendant as of the plaintiff; as that the one convey the property, and the other pay the purchase money.(*a*) But a decree to redeem may result in a foreclosure without a cross bill to foreclose; as if a bill filed by a mortgagor for redemption is by decree dismissed, because of the money not being paid at the time directed by the decree to redeem, that operates as a foreclosure, and is equivalent to a decree for foreclosure;(*b*) but the dismission of such a bill merely for want of prosecution has not that effect.(*c*)

It appears, that this case was submitted, and such a decree prepared and presented to the Chancellor as the parties thought proper to have passed without opposition or contest, which was accordingly signed. A decree might have been passed against the plaintiff commanding him to pay, as well as against the defendants ordering them to perform their part of the contract by conveying the property, as had been stipulated, on the payment of the purchase money. But this decree is, according to the ancient course, only in favour of the plaintiff and against the defendant; and therefore this petitioner can only obtain the relief he asks by a bill in the nature of a cross bill, it being now entirely too late to alter the decree in any manner whatever.

Whereupon it is ordered, that the said petition be and the same is hereby dismissed with costs.

After which the other parties filed a bill, in the nature of a cross bill, against *Ephraim Etchison*, for the amount of the purchase money so ascertained to be due, and it was on the 28th of March 1829 decreed, that *Etchison* pay the balance then due, and upon the payment thereof, that the plaintiffs execute a conveyance to him for the land, &c.

(*a*) Dorsey *v.* Campbell, ante, 356.—(*b*) The Bishop of Winchester *v.* Paine, 11 Ves. 199.—(*c*) Hansard *v.* Hardy, 18 Ves. 460.

MULLIKIN *v.* MULLIKIN.

A trustee, who had been appointed to make sale under a decree, ordered to bring the purchase money with the bonds and notes received or taken by him, into court, and displaced, because of his misconduct.

A distributee can be allowed nothing until all sums for which he is liable as principal or surety have been paid; and his assignee takes subject to all equities to which he is liable.

On a purchaser failing to pay the purchase money, the land may be resold at his risk under the court's equitable lien.

This bill was filed on the 4th of December 1812, by *Benjamin H. Mullikin*, *Richard D. Mullikin*, *Basil D. Mullikin*, *Jacob F. Waters*, *Basil Duckett* and *Sophia* his wife, *Margaret Mullikin*, *Ann Mullikin*, and *Kitty Mullikin*, against *Regnal Mullikin*, *Baruch Mullikin*, *John Waters*, *Ann Maria Waters*, and *Rachel Waters*, all of whom were minors. The bill states, that *Belt Mullikin* had died intestate seized of a large real estate which had descended to his children the plaintiffs *Benjamin*, *Richard*, *Basil D. Mullikin*, *Sophia*, *Margaret*, *Ann*, and *Kitty*, who were of full age, and to his children the infant defendants *Regnal* and *Baruch;* and to his grand-children, the infant defendants, *John*, *Ann Maria*, and *Rachel*, who were the children of the intestate's late daughter *Martha H. Waters* who had been the wife of the plaintiff *Jacob F. Waters;* that it would be for the benefit of all the representatives of the intestate to have the land sold, in order to make division of the proceeds thereof; but that a sale could not be effected without the interposition of this court. Whereupon the plaintiffs prayed, that a sale might be made; and that they might have such other relief as the nature of their case might require.

The defendants *Regnal* and *Baruch* having attained their full age, since the filing of the bill, put in their answer on the 6th of January 1817, and consented to a sale as prayed. And the other defendants, who were still under age, answered by guardian and admitted, that a sale should be made as prayed.

Upon which on the 8th of January 1817 a decree was passed in the usual form, appointing *Jonathan Meredith* trustee to make the sale; who, with his own consent, was on the 10th of March following removed, and *Basil D. Mullikin* appointed in his stead. After which this trustee, having given bond with *Baruch Mullikin* and *Regnal Mullikin* as his sureties, on the 4th of April 1821 filed his report, in which he states, that he had on the 5th of

December 1817 sold a part of the estate to *Benjamin H. Mullikin* for the sum of $5163 75; that on the 19th of October 1819 he had sold the residue of the estate to *Edward E. Anderson*, for the sum of $3000; that he had received a payment of $1798 71 from the purchaser *Benjamin H. Mullikin*, and held his notes for the balance; and that he had received in payment from the purchaser *Anderson* the sum of $1060; and held his notes for the balance. These reported sales were finally ratified on the 14th of February 1825, and on the same day the auditor reported a distribution of the proceeds among those heirs of the late *Belt Mullikin;* which was confirmed by an order passed on the next day, and the trustee directed to apply the proceeds accordingly.

On the 12th of September 1827 the heiress *Kitty*, who had married *Joseph Howard*, with her husband filed a petition, alleging, that the trustee *Basil D. Mullikin* had received the whole or the greater part of the purchase money, and had not paid the petitioner *Kitty* or her husband the share awarded to her; whereupon they prayed, that the trustee might be ordered to report his proceedings and to bring into court the proceeds of the sale made by him. Upon which he was ordered to report or shew cause; and accordingly on the 26th of February 1828 he filed his report or answer, loosely stating the sums he had received and paid away, and that the securities taken from the purchasers had been deposited with his surety *Baruch Mullikin*, and further that he had applied for the benefit of the insolvent laws. To the sufficiency of this answer the petitioners filed their exceptions on the 29th of February 1828, in which they also pray, that *Baruch Mullikin* may be required to bring those securities into court; that the trustee be directed to bring in the money received by him; and that he be displaced.

On the same 29th of February the heiress *Rachel* with *Thomas I. Hall* her husband, and *Harriet Waters* as assignee of the heir *John Waters*, filed their petition, in which they state, that the share awarded to *Rachel* and *John* had not been paid by the trustee; and pray, that they may be admitted as parties along with *Howard* and wife; which was ordered accordingly.

3*d March*, 1828.—Bland, *Chancellor*.—On consideration of the petition of *Howard* and wife and the answer of the trustee *Basil D. Mullikin* thereto; and of the objections to that answer, which objections being considered valid, it is ordered, that the said trustee *Basil D. Mullikin* be and he is hereby required to make a full and perfect answer to the said petition accordingly on

or before the first day of April next. And it is further ordered, that the said *Basil D. Mullikin* and the said *Baruch Mullikin*, his surety, bring into this court all the bonds or notes which were taken by the said *Basil* from the purchasers of the property in the proceedings mentioned to secure the payment of the purchase money; or in case the same or any part thereof has been paid to them or either of them, that they bring into this court the whole amount of the money so received by them or either of them, on or before the first day of April next, or shew good cause to the contrary: provided that a copy of this order, together with a copy of the said objections, be served on the said *Basil D. Mullikin* and *Baruch Mullikin* on or before the fifteenth instant. And it is further ordered, that the said *Basil D. Mullikin* be and he is hereby displaced, and *Thomas S. Alexander* is hereby appointed trustee in his stead with the same authority and subject to the same responsibility: provided that before he acts as such he shall give bond in the penalty of twenty thousand dollars as required by the said decree.

The trustee *Alexander* gave bond as required; on the 26th of March 1828 *Basil D. Mullikin* filed a full answer; on the 24th of September following the case, by order, was referred to the auditor; and on the 20th of December *Baruch Mullikin* filed his answer in obedience to this last order.

On the 5th of May 1828 the trustee *Alexander* filed a representation, stating, that the land reported to have been sold to *Benjamin H. Mullikin* was in fact purchased by him for the use of *Nicholas Woodward*, who had intermarried with the heiress *Margaret*, who had died after the confirmation of the auditor's report, by reason whereof the right to demand and receive her share had survived to her husband *Nicholas;* that a considerable amount of the purchase money was yet unpaid, which *Nicholas* admitted. No cause was shewn by *Benjamin H. Mullikin.*

And on the same 5th of May this trustee filed another representation, stating, that much of the proceeds of sale had been misapplied by the former trustee *Basil D. Mullikin* and was likely to be lost by his misconduct, and also by the misconduct of some of the other heirs, who were his sureties, or who were purchasers or the sureties of purchasers.

7th May 1828.—Bland, *Chancellor.*—The representations of the trustee, *Thomas S. Alexander*, having been submitted, the proceedings were read and considered.

It appears, that much of the purchase money for which the real estate was sold is likely to be lost, by reason of the misconduct or negligence of some of those to whom proportions of it have been directed to be paid by the order of the 15th of February 1825. That order was certainly founded upon the presumption that no part of the purchase money had been or would be lost by the misconduct of any of the persons among whom it was to be distributed. It is very clear, that no one of these distributees can be allowed to receive any portion of the share awarded to him until all sums, that ought to have been paid by him, and for which he is in any way liable, have been satisfied. And I hold it to be no less clear, that every assignee of a distributee must take subject to all equities to which such distributee was in any manner liable.

Whereupon it is ordered, that the order of the 15th of February 1825, in so far as it directs the payment of any money unto *Basil D. Mullikin*, the former trustee, and *Baruch Mullikin* and *Regnal Mullikin* his sureties, and *Benjamin H. Mullikin* and *Margaret Mullikin*, who died after the passage of that order and after having been married to *Nicholas Woodward*, be and the same is hereby rescinded and annulled.

On the 5th of May 1828, the trustee *Alexander* also represented, that the purchaser *Anderson* and his surety *Benjamin H. Mullikin* had not paid the purchase money; upon which by an order of the 7th of the same month, they were ordered to bring in the balance due, or shew cause. And they having failed to bring in the money, the matter was submitted for the judgment of the court upon the cause shewn.

25*th June*, 1828.—Bland, *Chancellor*.—The petition and representation of the trustee, together with the answer thereto of *Edward E. Anderson* and *Benjamin H. Mullikin*, having been submitted, the same, with the proceedings to which they relate, were read and considered.

It appears, that the whole amount of the purchase money for the tract of land heretofore sold as mentioned in the said representation has not been paid, and that for the amount still due the equitable lien held by this court yet subsists in full force and unimpaired.

Whereupon it is decreed, that the trustee *Thomas S. Alexander* proceed to make sale of the land, heretofore sold to the said *Edward E. Anderson*, for the payment of the balance of the pur-

chase money due thereon; that the sale be at his risk; and the terms thereof be for ready money payable on the day of its ratification. In all other particulars the trustee is directed to conform to the decree, according to which and the subsequent orders he has given bond for the faithful discharge of the trust reposed in him.

From this decree *Anderson* appealed, and filed a bond which was approved on the 29th of January 1829, but the appeal was some time after abandoned.

On the 4th of November 1828, *Daniel Kent* filed his petition, in which he states, that by a deed bearing date on the 5th of May 1825, the heir *Basil D. Mullikin* conveyed his interest in the estate of the intestate to the heir *Baruch Mullikin;* and that by a deed bearing date on the 18th of July 1827, the heir *Regnal Mullikin* conveyed his interest in the intestate's estate to the heir *Baruch Mullikin*, who having thus, by assignment and descent become entitled to three-tenths of the intestate's estate, by a deed bearing date on the first day of May 1828, assigned the same to the petitioner; and that he, this petitioner, is a *bona fide* purchaser for a valuable consideration without notice. Whereupon he prayed, that the shares of the intestate's estate so assigned to him might be directed to be paid to him accordingly. These three several deeds of assignment were each of them acknowledged and recorded as required by law; and were besides proved to have been executed by the grantors. It appears, that *Basil D. Mullikin* applied for the benefit of the insolvent laws on the 30th of May 1825; that *Regnal Mullikin* applied for the benefit of the insolvent laws on the 18th of May 1827; and that *Baruch Mullikin* made a similar application on the 8th of May 1828; but it is admitted that *Benjamin H. Mullikin* never made any such application. Whereupon it was ordered, that the matter stand for hearing provided a copy be served, &c. After which it was brought before the court and the solicitors of the parties were fully heard.

4th March, 1829.—Bland, *Chancellor*.—There is no principle of equity or justice upon which *Basil D. Mullikin*, *Baruch Mullikin*, *Regnal Mullikin*, *Benjamin H. Mullikin*, or *Nicholas Woodward*, or any one claiming under them or any or either of them, by virtue of any assignment or transfer made since the institution of this suit, can be allowed to receive any thing from this court until they have paid or brought in all sums of money for which

they are liable as principals or sureties, or until all the other heirs of the intestate have been fully satisfied and paid from the proceeds of the sale of the intestate's estate now in the hands of the court, or under its control for the purpose of distribution.

Whereupon it is ordered, that this case be and the same is hereby referred to the auditor with directions to state an account accordingly, distributing the proceeds of the sale of the intestate's estate now remaining under the control of the court; first among the heirs of the intestate who have not been paid, or in so far as they have not been satisfied; and the balance if any to the petitioner *Daniel Kent*, as the assignee of *Basil D. Mullikin*, *Baruch Mullikin*, and *Regnal Mullikin;* and to *Benjamin H. Mullikin* and *Nicholas Woodward:* provided it shall appear, that they have each of them paid or brought into court all sums of money, being portions of the said intestate's estate which they or either of them as trustee, purchaser or surety ought to have paid or brought into court, or for which they or either of them is liable because of its not having been so brought in or paid. But as there has been an appeal from the decree of the 25th of June 1828, directing the land purchased by *Anderson* to be sold for the payment of the purchase money due from him, the disposition of that amount must be suspended until that appeal has been finally determined; and consequently so much of this case as is affected by that appeal cannot be embraced in the statements contemplated by this order.

After which the auditor reported a distribution of the proceeds as directed, which was confirmed by an order of the 4th of May 1829; from which *Kent* appealed; and, at June term 1831, the order was affirmed by the Court of Appeals.

ALLEN *v.* BURKE.

The act of 1820, ch. 161, applies only to cases in which it remains to pass a final decree.

Where the suit abates after a final decree it may be revived by a *subpœna scire facias*. The form of the writ, and the mode of proceeding.

This bill was filed on the 2d of March 1824, by *Richard Allen* against *Micajah Burke* and *Ann* his wife, and *William Comegys*, to foreclose certain mortgages which had been given by the defendant *Ann*, while sole, to the plaintiff on a certain parcel of ground and its rents and profits, of which she held the remainder in fee simple, after the expiration of a lease for years held by the defendant *Comegys*. The defendants answered: after which the defendant *Ann* died; and the suit was revived against *Elizabeth Burke*, her daughter and heir. Commissions were then issued and testimony taken and returned; upon which the case was heard; and on the 29th of April 1828 it was decreed, that the mortgaged property be sold; and that the defendant *Comegys* pay to the plaintiff the sum of $846 97, &c.

After which *Sarah Allen*, by her petition, stated, that the plaintiff *Richard Allen* had died since the passing of the decree; and that she had obtained letters of administration with the will annexed on his personal estate. Whereupon she prayed, that the decree might be revived against the defendants; that *subpœnas* might be issued against them; and that she might have such other and further relief in the premises as the nature of her case might require. Upon which *subpœnas*, in common form, were issued without any special direction or order from the court; which having been returned summoned, the petitioner moved, that the decree might be ordered to stand revived.

12*th February*, 1829.—Bland, *Chancellor*.—The motion of the petitioner *Sarah Allen*, that the decree should be revived having been submitted on her part, and no cause having been shewn to the contrary, the proceedings were read and considered.

The act of 1820, ch. 161, it is evident, was intended to provide a course of proceeding by which any party who had a right to revive a suit that had abated, in the manner specified, before a final decree, might have it revived in a mode less expensive and dilatory than in the common way by a bill of revivor. It is manifest, that the general object of that law was to shorten and envigorate the

proceedings in chancery. It certainly cannot be considered as embracing any cases of abatement after a decree; because its phraseology expressly refers to cases which have not been brought to a termination, and to suits where "such final decree as to right shall appertain," remains to be made; and also, because it could not have been the intention of the legislature to provide a new mode of proceeding more expensive and less energetic than one already well established; as is the case in suits abating by the death of a party after a decree.

According to the course of proceeding in chancery, where a party dies, or a female plaintiff marries, after the final decree has been enrolled, such decree and proceedings must be revived by a *subpœna scire facias*. Which mode of reviving a suit, however, can only be pursued by or against the heir, the legal representatives, or those who are privy in blood or contract to the deceased party; and who, as such, may be benefited or bound by the decree: but they are precluded from going into its merits; and upon the same principles the merits of the decree cannot be questioned even on a bill in nature of a bill of revivor by an assignee or a devisee.(*a*) If the party summoned fails to shew cause, or the cause shewn should be deemed insufficient, he may, if required, be examined on interrogatories as to any matter necessary to the proceedings. But where there have been any proceedings subsequent to the decree, this process will be ineffectual, as it revives the decree only and nothing more.(*b*) It is said, that in England it has become the practice to revive in all cases indiscriminately by bill, because of its having become unusual to enroll decrees; but in Maryland all decrees are considered as enrolled so soon as they are signed;(*c*) and consequently, a bill of revivor, or this mode of reviving a suit, which has abated after a decree, by a *subpœna scire facias*, must be considered as the most regular, if not in fact the only modes by which a suit can properly be revived in this court.(*d*)

A *subpœna scire facias* may be obtained by petition, and must be served like a *subpœna* to answer. On its appearing by the return, that the process has been made known, and the party regularly summoned, if no cause be shewn to the contrary, nor any plea in

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(*a*) Dunn *v.* Allen, 1 Vern. 283, & 426; Owen *v.* Curzon, 2 Vern. 237; Clare *v.* Wordell, 2 Vern. 548; Minshull *v.* Lord Mohun, 2 Vern. 672.—(*b*) Mitf. Plea. 70. (*c*) Hollingsworth *v.* McDonald, 2 H. & J. 237.—(*d*) Croster *v.* Wister, 2 Rep. Chan. 67; Wharam *v.* Broughton, 1 Ves. 181; White *v.* Hayward, 2 Ves. 461; Fallows *v.* Williamson, 11 Ves. 307.

bar, &c.(*e*) the court will, without requiring any appearance to be entered, on motion, at any time after the first four days of the term to which the party has been returned summoned, order the decree to stand revived.(*f*) The court of chancery in this, as in various other particulars, regulates its proceeding by analogy to the course of the common law; according to which, where after judgment a party dies, the judgment may be revived by a *scire facias*, on which, if returned made known, and no cause is shewn, the judgment is at once ordered to stand revived without an appearance. So in chancery. But in this case nothing more than a common *subpœna* to answer has been issued. No *subpœna scire facias* has been as yet either asked for, issued or made known. Therefore it is

Ordered, that the said petition of the said *Sarah Allen* stand over, with leave so to amend it as to pray for a *subpœna scire facias*, and until such process can be issued and returned to the term next after the same shall have been issued.

The petition was amended as suggested by this order, and a *subpœna scire facias*, in the following form, was issued:

"*Maryland, sct:*—The State of Maryland, to *Micajah Burke*, *Elizabeth Burke*, and *William Comegys* of Baltimore county, Greeting: You are hereby commanded, that all excuses set apart you personally be and appear before the High Court of Chancery, to be held at the city of Annapolis on the second Tuesday of March next, to shew cause, if any you have, why a decree passed by the said court on the 29th day of April 1828 against you, at the suit of the late *Richard Allen*, should not stand revived against you at the suit of *Sarah Allen*, administratrix with the will annexed of the said late *Richard Allen*, as prayed by her petition in the said court exhibited. Hereof fail not, as you will answer the contrary at your peril. Witness the Honourable *Theodorick Bland*, Chancellor, this 16th day of February, Anno Domini, 1829.

"*Test*, Ramsay Waters, *Reg. Cur. Can.*"

The sheriff on the 6th of March 1829, returned the writ thus endorsed: "Summoned *Comegys*, summoned *Micajah Burke* and *Elizabeth Burke*." Upon which the matter was again brought before the court.

18*th March*, 1829.—Bland, *Chancellor*.—It appearing by the return of the *subpœna scire facias*, that the said defendants have

(*e*) Comber's Case, 1 P. Will. 767.—(*f*) 1 Harr. Pra. Cha. 670; 2 Harr. Pra. Cha. 191; 2 Fowl. Exch. Pra. 301, 305, 419.

been summoned, and no cause having been shewn, it is therefore *Ordered*, that the said decree stand revived to all intents and purposes whatever in favour of the said *Sarah Allen*, administratrix with the will annexed of the said late *Richard Allen*, against the said defendants *Micajah Burke*, *Elizabeth Burke*, and *William Comegys*, as prayed by the petition of the said *Sarah*.

GRIFFITH *v.* BRONAUGH.

The act of 1820, ch. 161, only gives a new mode of proceeding in certain cases in place of a *proper* bill of revivor.

After a decree to account, or a final decree a *defendant* may revive the suit; but in general he cannot revive it in any other case.

In an injunction case, it may be ordered, on petition of the defendant, that the representatives of the late plaintiff, on a copy of the order being served on them, proceed to revive the suit on or before a certain day, or that the injunction be dissolved. If such representatives are numerous, widely dispersed, unknown or nonresidents, it will be sufficient to have it entered on the docket, that they come in and revive before the end of the then next term.

This bill was filed on the 3d of July 1820, by *Samuel G. Griffith* against *John W. Bronaugh*, to obtain an injunction to stay proceedings at law on a judgment recovered by the defendant, *Bronaugh*, against the plaintiff, *Griffith*. The injunction was granted as prayed. After which, in December 1820, the plaintiff, *Samuel*, died intestate, and administration was granted on his personal estate to *Luke Griffith* of Harford county: upon which the defendant by his petition, filed on the 17th of November 1821, prayed, that he might be made a party, &c.; and it was ordered, that he be summoned accordingly. Afterwards, *Luke Griffith* not having appeared, the defendant, by his petition filed on the 11th February 1829, prayed, that *Luke Griffith* might be ordered to appear and cause this suit to be revived, or that the injunction be dissolved.

13*th February*, 1829.—Bland, *Chancellor*.—It appears, that this defendant, by his petition of the 17th of November 1821, suggested the death of the plaintiff, and prayed that his administrator might be made a party, evidently with a view to have the suit

revived in the mode prescribed by the act of 1820, ch. 161. That act, however, only gives a new and more expeditious mode of proceeding to those who could, independently of its provisions, revive by a *proper* bill of revivor. It is a general rule, that where a suit abates, by the death of a party, before the final decree, the defendant cannot have it revived; since no one can be compelled to commence, renew, or revive a suit against another. After a decree to account, by which both parties are made actors, or after a final decree, a defendant may revive; because he may have an interest in the execution of the decree. The good sense of the rule is, that in every case where a defendant can derive a benefit from the further proceeding, he may revive.(*a*) But it is very clear, that this is not such a suit as this defendant can be allowed to revive.

The only object here, the suit having been terminated by abatement, is to have the injunction dissolved so as to enable this defendant to proceed at law. Which, according to the course of the court, may be attained by a petition, as in this instance, praying that the administrator of the deceased plaintiff may revive within a stated time, or that the injunction stand dissolved. For, although in strictness the whole proceedings are abated by the death of either party, yet the injunction, being a judgment of the court, continues in full force until it has been dissolved by the court itself.(*b*)

Whereupon it is ordered, that the petition of the said defendant, filed on the 17th of November 1821, be and the same is hereby dismissed with costs. And it is further ordered, that the injunction heretofore granted in this case be dissolved after the 14th day of March next, unless the said *Luke Griffith*, administrator of the late *Samuel G. Griffith*, before that day proceed to revive the said suit. Provided that a copy of this order, together with a copy of the said petition filed on the 11th instant, be served on the said *Luke* on or before the 2d of March next.

Upon a copy of this order the sheriff of Harford county made return on oath, that *Luke Griffith* therein named resided out of the State of Maryland. Upon which the case was again brought before the court.

(*a*) Lord Stowell *v.* Cole, 2 Vern. 219; Williams *v.* Cooke, 10 Ves. 406; Horwood *v.* Schmedes, 12 Ves. 311.—(*b*) Gilb. For. Rom. 198; 1 Newl. Chan. 229; Eden. Inj. 93.

19*th March*, 1829.—Bland, *Chancellor*.—It is a general rule of this court, that the legal representatives of a deceased party must be served with notice to revive the suit within a limited time before the injunction can be dissolved.(*c*) But this rule must be relaxed to meet the justice of the case, and accommodated to the exigency of circumstances.(*e*) Where it was shewn, that the legal representatives of the deceased were numerous, much dispersed, and not well known, and that it would be difficult, if not impossible, to serve any order upon them; it was on motion ordered, that unless the representatives of the complainant should come in before the end of the next term and cause the suit to be revived, the injunction should stand dissolved.(*f*) In the case under consideration it appears, that the order could not be served within the State; on consideration of which and the length of time that has elapsed since the death of the late plaintiff, I deem this a case in which it becomes necessary to depart from the general rule.

Whereupon it is, on motion of the defendant by his solicitor, *Ordered*, that unless the said *Luke Griffith*, or some other legal representative of the said late *Samuel G. Griffith*, to whom the right belongs, shall come in before the end of the next term and cause this suit to be revived, the said injunction heretofore granted shall stand dissolved after that time.

Under this order the bill was on the 30th of September 1829 dismissed; but being soon after reinstated by consent, *Luke Griffith*, the administrator, was admitted as plaintiff in place of his intestate, and *Bronaugh*, the defendant, filed his answer, to which the plaintiff put in a general replication, and a commission issued to take testimony, which having been returned without any having been taken, the case was set down for final hearing; and on the 18th of January it was *decreed*, that the injunction be perpetual.

(*c*) Duke of Chandos *v.* Talbot, Select Ca. Chan. 24.—(*e*) Eden. Inj. 40, 66; 1 Fow. Ex. Pra. 287.—(*f*) Carter *v.* Washington, 1 Hen. & Mun. 203; Kenner *v.* Hord, 1 Hen. & Mun. 204.

SNOWDEN *v.* SNOWDEN

It is sufficient, that the answer of an adult defendant be sworn to before some judge or justice of the peace within the State.

It was formerly the practice to send the commission to *four*, but now it is sent to only *one* commissioner to appoint a guardian and take the answer of an infant defendant within the State. If a person appointed as such a guardian accepts the trust, he may be compelled to answer. But if the infant defendant be out of the State, the commission to appoint a guardian and take his answer must be sent to *three* persons.

The express provisions of a constitutional act of Assembly cannot become obsolete, and are of superior authority to any usage or adjudged case whatever.

If a defendant be not in fact a nonresident, the order of publication against him is a nullity.

This bill was filed on the 28th of February 1829, by *Thomas Snowden* jun'r, *John Contee* and *Ann Louisa* his wife, *Albert Fairfax* and *Caroline E.* his wife, *Timothy P. Andrews* and *Emily R.* his wife, against *Richard N. Snowden*. The bill states, that the plaintiffs were tenants in common with the defendant of a tract of land, which would not admit of partition without injury or loss; that the defendant is an infant; and that he "is a citizen of Ann Arundel county, but is at this time in the State of New York." Upon which they prayed, that the land might be sold to effect a division; and that a *subpœna* might issue against the defendant. The plaintiffs sued out a commission in the usual form directed to *Benjamin Allen* alone, of the State of New York, authorizing him to appoint a guardian, and to take the infant's answer by such guardian. Which he did, and returned the answer accordingly. The whole proceeding being in precisely the same form as if such a commission had gone to *one* commissioner only within the State, to obtain the answer of an infant defendant residing here.

18*th April*, 1829.—Bland, *Chancellor*.—On adverting to the act of Assembly in relation to this matter,(*a*) I deemed this proceeding erroneous: whereupon the plaintiffs on the 15th instant filed their petition praying for a commission to *three* persons therein named, and again submitted their case upon the notes of their solicitor, which with the proceedings were read and considered.

According to the English course of proceeding it would seem to be a general rule, that the defendant must appear in person and swear to his answer before one of the masters in chancery. This

(*a*) 1797, ch. 114, s. 5.

was greatly inconvenient to defendants who resided at any distance from the place where the court was held. Hence at first as an indulgence and by a special order, but now and for a long time past, where a defendant resides more than twenty miles from London, or is unable to travel, it is a matter of course to issue a *dedimus potestatem* to take his answer.(*b*) And the *four* commissioners, to whom the *dedimus* is directed, are named by the parties, and approved in like manner as commissioners for taking testimony; any *three* or *two* of whom are to take the answer.(*c*)

With regard to an infant defendant, however distant within the kingdom he may reside, he must be brought in; because the court must see, from inspection and observation, that he is an infant, for whom it is necessary, that a guardian should be appointed by whom he may answer. But if the infant be abroad, or unable to attend, a commission must go to appoint a guardian and take his answer by such guardian. The *dedimus* or commission, in such case is similar; the four commissioners are appointed in the same way as; and it is executed in all respects like, that which goes to take the answer of an adult defendant who resides more than twenty miles from London.(*d*)

The practice in Maryland is different. I have met with no evidence, that it ever was at any time, either before or since our revolution, the practice of this court to have the defendant actually brought in merely to swear to his answer before the Chancellor or the register of the court. It appears to have been always the practice here for the defendant to swear to his answer before a judge or a justice of the peace, which when thus authenticated and filed, has been uniformly received and dealt with as an answer.(*e*) This practice is admitted on all hands to be exceedingly convenient, and I have never heard of the slightest evil arising from it. But if a defendant neglects or refuses thus to answer, he may be attached and committed to close custody until he does answer.(*f*)

(*b*) 1 Harr. Pra. Chan. 283; 1 Newl. Chan. 124.—(*c*) 1 Harr. Pra. Chan. 288. (*d*) Marlborough *v.* Marlborough, 1 Dick. 74; Jongsma *v.* Pfiel, 9 Ves. 357; Tappen *v.* Norman, 11 Ves. 563.—(*e*) Brice *v.* Alexander, MS. Chan. Proc. lib. W. K. No. 1, fol. 43; Mackall *v.* Morsell, MS. Chan. Proc. lib. W. K. No. 1, fol. 223. (*f*) Cooper *v.* Cooper, 1788, MS. Chan. Proc. lib. S. H. H. let. B. fol. 351.

Bowie *v.* Mockbee.—*December* 1780.—Rogers, *Chancellor*.—On motion of the complainant's solicitor, ordered, that the defendant stand committed to close custody of the sheriff of Prince George's county, to remain in custody of the said sheriff until the said defendant shall put in and file a good and sufficient answer in this case, and pay the costs of the said attachment of contempt issued against him in the cause aforesaid.—*Chan. Proc. Lib. No.* 1, *fol.* 295.

If an adult defendant reside abroad or beyond the jurisdiction of the court it has been the practice, where he himself wishes or is willing to answer, to issue a commission, on petition, for taking his answer to *four* commissioners. And the course of proceeding in such case appears to be substantially similar to the English mode of obtaining the answer of a defendant who resides abroad or at a greater distance than twenty miles from London.(*g*)

It would seem, that, according to the course of proceeding in the English Court of Chancery, there may be a material distinction between a guardian *ad litem* of an infant defendant, and a guardian having no other concern with the case than merely to answer the bill. The guardian *ad litem* must not only answer the bill, but is bound to inform himself of all circumstances, and to make as good a defence for his ward as the nature of his case will admit; while on the other hand, as it would seem, the duty of a guardian to answer only, extends no further than merely to the making and filing of an answer.(*h*) But however this may be in England, I have met with no clear unequivocal evidence of any such distinction ever having prevailed here.(*i*) In all cases in this court the guardian of an infant defendant, whether appointed by a special order, or under a commission, has always been considered and treated as a guardian *ad litem*, appointed for the purpose of answering and defending the suit, and whose duty it is not only to answer the bill, but to make the best defence he can according to the circumstances, for the benefit of his ward; and this appears to have been recognised as the duty of such a guardian by our acts

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(*g*) Hornby *v.* Pemberton, Mosely, 57; Prout *v.* Slater, MS. 3d April, 1799, Chan Proc. lib. S. H. H. No. 7, fol. 25; Chan. Proc. 1761, lib. D. D. No. J. fol. 59.

(*h*) 1 Newl. Chan. 105, 138; 2 Newl. Chan. 152; 1 Harr. Pra. Chan. 708.

(*i*) CHAPMAN *v.* BARNES.—This was a creditor's bill filed against the heir and administrator of the late Richard Barnes to have his land sold for the payment of his debts. The bill stated, that Mary E. Barnes, the heir of Richard her father, was an infant, and prayed a *subpœna* against her as well as against the administrator; a *subpœna* was issued accordingly, and afterwards a commission was issued in the usual way to take the answer of the infant, under which her answer was returned and filed on the 24th of February 1814.

19th March, 1814.—KILTY, *Chancellor*.—A motion was made by counsel for the appointment of a guardian to defend for the infant Mary Elizabeth Barnes, according to the practice in England. The Chancellor is not apprised of its having been done in this State; but such a practice appearing to be equitable and probably necessary, it is hereby ordered, that John Barnes, of Charles county, be and he is hereby appointed guardian for the said Mary Elizabeth Barnes, to defend on her behalf the said suit.

of Assembly in relation to this matter.(*j*) It appears to have been formerly usual, where the infant resided within the State, either to have him brought into court by the messenger, if able to attend, and a guardian assigned him, by whom he was to answer,(*k*) or to issue a commission to *four*, or a plurality of persons, any *three* or *two* of whom were authorized to appoint a guardian and take his answer by such guardian in exact conformity to the English practice.(*l*)

If it appears upon the face of the proceedings, or upon enquiry into the fact, that the defendant is an infant, the court cannot proceed without a guardian to answer and defend for him ;(*m*) and for that purpose the court may either have him brought before it, or allow a commission to be issued, which is now much the more usual course ; for, although there can be no doubt of the power of the court to have an infant defendant brought in from any part of the State ;(*n*) yet it is rarely found to be convenient, or necessary to do so merely for the purpose of assigning to him a guardian *ad litem*. If a guardian so appointed refuses to act, or after accepting the trust dies, another may be appointed in his stead by special order or under a commission.(*o*) But although a person appointed guardian *ad litem* cannot be compelled to take upon himself the trust ; yet if he does accept it, he may be compelled by attachment to appear and answer.(*p*) For a long time past it has been

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(*j*) 1785, ch. 72, s. 1 ; 1797, ch. 114, s. 5.—(*k*) Eyles *v.* Le Gros, 9 Ves. 12 ; Hill *v.* Smith, 1 Mad. Rep. 290.—(*l*) Gist *v.* Gist, 3d November 1798, Chan. Proc. lib. S. H. H. No. 7, fol. 48, 52 ; Merriweather *v.* Hood, MS. June 1800 ; McCoy *v.* Springer, MS. October 1800.—(*m*) Roberts *v.* Stanton, 2 Mun. 133.—(*n*) Dulany *v.* Frazer, MS. per Hanson, Chancellor, 19th November, 1792.

Griffith *v.* Davis.—1789.—Rogers, *Chancellor*.—On motion of complainant's counsel, ordered, that the messenger bring into court the body of Henrietta Davis, the infant, on the fourth day of next court, she being heretofore returned by the sheriff of Montgomery county, summoned to appear in this cause, and attachment having been awarded on her failure to appear on the said summons.—*Chan. Proc. lib. S. H. H. let. C. fol.* 61.

(*o*) 2 Newl. Chan. 155 ; Wilson *v.* Bott, 1 Pric. 62 ; Perkins *v.* Hammond, Dick. 287 ; Smith *v.* Marshall, 2 Atk. 70 ; McMechen *v.* Evans, MS. 3d November 1817. (*p*) Taylor *v.* Durben, 1787, Chan. Proc. lib. S. H. H. let. B. fol. 41.

Perkins *v.* Gleaves.—*February*, 1790.—Hanson, *Chancellor*.—Rule that Doctor William Gleaves shew cause to this court on the first of April next, why an attachment should not issue against him for a contempt in refusing to answer on behalf of the infant to whom he was appointed guardian *ad litem*, by a commission issued by this court and returned. No cause having been shewn, it is ordered that attachment issue against William Gleaves to answer, &c.—*Chan. Proc. lib. S. H. H. let. C. fol* 582.

considered as the settled practice, to let a commission go to *one* commissioner only within the State to appoint a guardian and take the answer of an infant defendant; which has been found to be so cheap and convenient a method, that I have never known a commission, in my time, to be issued for that purpose to more than *one* commissioner within the State.(*q*)

In England, when an infant defendant resides out of the jurisdiction of the court, a commission may be sent abroad to appoint a guardian and take his answer, and on a supplemental bill being afterwards filed the same guardian may be authorized to answer for him.(*r*) But no instance has been shewn, prior to the year 1797, in which a commission has issued from this court, to obtain the answer of an infant defendant beyond the jurisdiction of the court, to a single commissioner only. In the case cited,(*s*) the bill was filed to obtain a conveyance of lands in specific performance of a contract; it was stated in the bill, that the infant defendants lived in Adams county in Pennsylvania; and *subpœnas* were prayed generally. Upon which a commission was, on the 14th of December 1802, issued to *one* commissioner only in *Frederick county* in this State, which is conterminous with Adams county in Pennsylvania; who in pursuance thereof appointed a guardian, stated to be of *Frederick county*, by whom the answers were taken and returned. The inference from this case is, that it was believed to be more convenient thus to send the commission to *one* commissioner in Frederick than to *four* in Pennsylvania.

Such appears to have been the understanding of the profession as to the practice when the legislature declared, that in cases of *partition*, the Chancellor on the complainant's motion may direct a commission to issue unto *three* persons such as he shall approve, authorizing them or any two of them to go to the infant and appoint a guardian for the purpose of answering and defending the suit, and authorizing them likewise to take the answer and return it to the court.(*t*) Which provision was afterwards extended to cases where all the persons reside out of the State. And it has been also provided, that in case of lands in this State descending to minors residing out of this State, on a bill filed by the *prochein ami* of any such minor, a commission may be issued to *three* per-

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(*q*) Brown *v.* Brooker, MS. October 1800, &c. &c.—(*r*) Jongsma *v.* Pfiel, 9 Ves. 357; Lushington *v.* Sewell, 6 Mad. 28.—(*s*) Diffendall *v.* Diffendall, Chan. Proc. lib. S. H. H. No. 7, fol. 148, 155.—(*t*) 1797, ch. 114, s. 5.

sons in the State where the infant resides, authorizing them or any two of them to appoint a guardian to answer and to return his answer.(*u*) In these particulars therefore the practice of the court has been established by positive legislative enactment. The course is prescribed in cases where it is said to have been doubtful whether or not there was any method of proceeding whereby the object might be attained. The mode thus pointed out, cannot be considered as an addition to any antecedent one, since it is expressly declared, that it was prescribed in order to remove all uncertainties upon the subject; and not for the purpose of introducing a new form of proceeding in addition to an existing one. It does not give a cumulative remedy, but unalterably settles and defines a previous ambiguous practice, so that the court might safely and readily exercise its then existing powers. Taking this view of the subject it clearly follows, that the court can have no authority to pursue a course of proceeding different from that which has been thus laid down by the legislature. Any practice established by the court itself may be altered for good reasons; or by usage such practice may, and in many instances has gradually glided into a new or different course; but the positive enactments of the General Assembly can never be disregarded.

By an English statute enacted in 1346,(*v*) it was declared, that the justices of gaol delivery should take an oath before the Chancellor, &c. yet no such oath is now taken, and the statute is considered as obsolete;(*w*) and by an act of Parliament, passed in 1416,(*x*) it was declared, that no one should sue out a *subpœna* in chancery until he had given security for costs in case he failed to sustain his bill. It is said, that this statute has in England by degrees grown out of use, and is now entirely vanished.(*y*) And against a statute passed in the year 1705,(*z*) a practice of no more than seven years was allowed to prevail.(*a*) A statute passed in 1413,(*b*) directed, that none should be elected members of parliament who were not at the time resident of the place from which they were returned. This is another instance wherein the principle of desuetude has been avowedly set up against an unrepealed legislative enactment.(*c*) And our own

(*u*) 1818, ch. 193, s. 11 & 12; 1831, ch. 311, s. 8.—(*v*) 20 Edw. 3, c. 3.—(*w*) Jurisd. Court Chan. 13.—(*x*) 15 Hen. 6, c. 4.—(*y*) 1 Harr. Pra. Chan. 200; 2 Com. Dig. 371.—(*z*) 4 & 5 Anne.—(*a*) Regina *v.* Ballivos de Bewdley, 1 P. Will. 223; Money *v.* Leach, 3 Burr. 1755.—(*b*) 1 Hen. 5, c. 1.—(*c*) 2 Hall. Mid. Ages, 156.

act,(*d*) which positively prohibits clerks and registers from suffering the papers and records to be taken out of their offices, appears to have been so long and so generally disregarded as to have fallen into oblivion.(*e*)

These precedents would seem to sanction the position, that a positive legislative enactment may be virtually repealed by a long, general, and uninterrupted course of practice. But they are precedents which I should feel a great repugnance to adopt and enlarge upon. I hold it to be my duty to treat the acts of my predecessors with respect; and to yield implicit obedience to my superiors; yet I cannot lose sight of the sphere assigned to the judiciary, and allow myself, by any suggestion arising from the case, or by following any lightly considered precedent, to overstep the limits constitutionally prescribed to the judicial department to which I belong. No judge or court, either of the first or last resort, can have any right to *legislate;* and there can be no difference between the power to declare an act of Assembly obsolete, and the power to enact a new law. The power to repeal and to enact are of the same nature. I shall therefore always consider an express provision of a constitutional act of Assembly as an authority superior to any usage or adjudged case whatever.

The first enactment upon this subject(*f*) is strictly and literally applicable to the taking of an answer of an infant abroad in a partition case, such as this is; and that act has, as it would seem, been since much extended.(*g*) Hence I hold myself imperatively

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(*d*) 1747, ch. 3, s. 10.—(*e*) 1832, ch. 302, s. 1.—(*f*) 1797, ch. 114, s. 5.—(*g*) 1818, ch. 193, s. 11 & 12.

Burd v. Greenleaf.—It was objected in this case, that all the parties were not before the court. Publication against the infant heirs of a defendant had been made according to the act of 1799, ch. 79, s. 1 & 4, instead of serving a *subpœna* upon them.

February, 1806.—Kilty, *Chancellor*.—It appears, that the general acts of Assembly for regulating the chancery practice do not extend to infants, but that particular acts have been passed for the purpose of binding them; as in the cases of contracts by their ancestors, mortgages, debts, partition, &c. The first section of the act of 1795, ch. 83, did not, as the complainants have contended, extend to infants, but provided for publication against persons of full age. The act of 1799, ch. 79, put infants on the same footing with other defendants, excepting reserving at all events the liberty of appearing within eighteen months. This section is not restricted to laws within the first section of the same act, but is applicable also to the first section of the act of 1795, or any other general act. Let us examine the intention of the two acts. The act of 1795 permits an appearance and re-examination within eighteen months, and the first decree is of course not final. The reason of which might be, that there could be no certainty of the absent defendant having seen the publication.

bound by the legislative rule thus laid down. But precedents have been adduced to shew, that this legislative rule has become obsolete, or that another and equally efficacious parallel mode of proceeding had been in force, and is now in use. All the precedents, I have seen, of commissions for taking answers abroad, are those of adult defendants; in all of which the commission, as in England, was directed to *four* commissioners. I have been referred to no example of a commission to take the answer of an *infant defendant* who resided in a foreign country or any other State of our Union; nor have I met with any. But prior to and about the year 1797, it was the practice, as well in cases of infant defendants within, as of adult defendants out of the State, to send the commission to *four* or at least a plurality of commissioners; and hence the first legislative enactment, in relation to this matter,(*h*) cannot be regarded as in any sense leaving an old and parallel practice in full force; since it was the practice in all cases to send the commission to a plurality of commissioners. The cases that have arisen since the passage of that act, can therefore only be regarded as evidence of a departure from the legislative rule, and not as proof of a coexisting parallel practice. There have been only four cases adduced as shewing a departure from the directions of the act; and all of them are cases of commissions directed to *one* commissioner only, in the *District of Columbia*, to take the answers of infants resident there.(*i*) All of those cases manifestly appear to have passed *sub silentio;* and, I can readily conceive how easily such a proceeding, which had become the established mode of obtaining an answer from an infant defendant within this State, should have been pursued as a correct way of getting an answer from an infant defendant residing in Washington county of the District of Columbia, which had formerly been a part of this

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The act of 1799 makes the first decree final, provided the *subpœna* is proved to be served. There is no doubt a considerable difficulty in making this service and proof, where the party is out of the State; but the complainant, in any case, has his choice of the two modes of proceeding. The difficulty of serving the *subpœna* is greater as to the infants. And the reason does not apply to them, for after such service, the eighteen months is still allowed to them. The act of 1795 allows the publication, which by the fourth section of the act of 1799 applied to the infant defendants in this case. The order may be considered as made under either act, according as the *subpœna* might or might not be served, and the service might have been directed with that view.

(*h*) 1797, ch. 114, s. 5.—(*i*) Low *v.* Dawson, MS. 30th September, 1818; Burgess *v.* The Bank of Columbia, MS. 13th April 1820; Law *v.* Law, MS., 6th December 1824; Shaaf *v.* Taney, MS. 10th May 1826.

State. Such precedents are generally considered to be of the lowest class; but when adduced for the purpose of controlling or abrogating an act of Assembly, they cannot be allowed the weight of a feather.

The original act(*j*) speaks of an infant residing out of the State; and the mode which it prescribes, for obtaining the answer of such an infant, is clearly one which may now be, and was formerly very commonly pursued for obtaining the answer of an infant within the State; and therefore, whether the infant is considered as being at the time a nonresident, in every sense of that term, or not, is unimportant. It is sufficient, that he is then, when the answer is taken, in the state or country to which the commission is directed: for, if he has a guardian appointed by whom his answer is taken in the most formal manner, so as to warrant its being received whether he is considered as a resident within or out of the State; then the answer, being in a form to suit either alternative, it becomes unnecessary to decide whether he was, at the time of its being taken, a mere sojourner abroad, or actually "residing out of the State," or not.

The case of *publication* against a nonresident, presents an entirely different question; because the publication is to stand in the place of actual notice only in case the party be in truth a nonresident; and therefore, if he does not, in fact, at the time, reside out of the State, such a substitute for the actual service of process cannot be resorted to, for the purpose of enabling the court to act upon the case; and therefore, the decree will be void: since the *publication* against a nonresident can, in no way, be fashioned, like a commission to take the answer of an infant defendant, to suit both alternatives of a residence, or a non-residence; and consequently, if the *publication* be not valid upon the ground of the actual nonresidence of the party, it is a nullity to all intents and purposes whatever.

Whereupon it is ordered, that a commission issue as prayed by the said petition of the plaintiffs filed on the 15th instant.

A commission was issued and an answer returned accordingly; after which, on the 8th May 1829, it was decreed that the real estate be sold, &c.

(*j*) 1797, ch. 114, s. 5.

MAYER *v.* TYSON.

An answer held, on exceptions, to be insufficient, is as no answer.

If a defendant does not, after exceptions, put in a sufficient answer, as ordered, the bill may be taken *pro confesso* and a final decree passed; or the case may be prosecuted, as against the other defendants, to a final decree.

Under what circumstances, and at what stage of the case the plaintiff may be required to give security for costs.

This bill was filed on the 10th of December 1827, by *Lewis Mayer* and *Isaac Lohman*, of the city of Philadelphia, partners trading under the firm of *Mayer & Lohman*, against *Thomas Tyson*, *Richard H. Douglas*, *Christian Keller*, *Isaac Tyson* jun'r, *Nathan Tyson*, *Benjamin P. Moore*, *John Glenn*, and *Joaquim de Mier*.

The bill states, that the defendant *Thomas Tyson* had purchased of the plaintiffs a large quantity of rum and brandy, for which there was then due a balance of $1425 54; that the defendant *Thomas*, being in an insolvent condition, had by a deed assigned all his property to the defendants, *Richard*, *Christian*, *Isaac*, *Nathan*, and *Benjamin*, in trust for the benefit of such of his creditors as should release their respective claims within a certain time; that these plaintiffs had not so released their claim; that the defendant *Thomas* had applied for and obtained the benefit of the insolvent law, under which the defendant *John* had been appointed his trustee; that the rum and brandy purchased by the defendant *Thomas* of these plaintiffs was in fact bought by him merely as the agent of the defendant *Joaquim*, who was in truth the real debtor to the plaintiffs; that the defendants who were the trustees of the defendant *Thomas* had brought suit against the defendant *Joaquim* to recover the amount due from him for the rum and brandy so purchased, with a view to have it applied, according to their trusts, in satisfaction of the creditors of the defendant *Thomas*. Whereupon the plaintiffs prayed, that, as the debt due from the defendant *Joaquim*, to the amount due to them, was properly owing to them, they might be first satisfied, &c.

All the defendants answered jointly or separately, except *Joaquim*, who being a nonresident, publication was made, warning him to appear, &c. To the answer of the defendant *Thomas* the plaintiffs filed exceptions; because of its being, as they alleged, insufficient in several specified particulars. Upon which it was ordered, that those exceptions stand for hearing on the 15th of

April 1828; provided a copy be served, &c. Which having been served as required, the matter was submitted.

21*st April*, 1828.—Bland, *Chancellor*.—Ordered, that the exceptions of the plaintiffs to the answer of the defendant *Thomas Tyson* be and they are hereby ruled good; and that he make a sufficient answer to all the several matters and allegations of the bill on or before the second day of June next, or the same may, after that day, be taken *pro confesso*.

The time allowed by this order for putting in a sufficient answer having elapsed, and the defendant *Thomas Tyson* having failed to answer as required, the plaintiffs brought the matter before the court, and moved that the case might proceed as against him, and the other defendants.

10*th July*, 1828.—Bland, *Chancellor*.—Where the answer of the only person who has been made a defendant is, upon exceptions, held to be insufficient, the plaintiff is authorized, according to the English course of proceeding, to take the case up where it stood when the insufficient answer was filed, and proceed thenceforward against the defendant, so as to have him committed to custody until he does answer, or to have the bill taken *pro confesso*; because an insufficient answer is as no answer at all.(*a*) And so, where only one of the defendants stands in the situation of not having answered sufficiently, the like course must be had against him alone, so as to enable the plaintiff to proceed with effect against the other defendants.(*b*)

Upon this principle, and as it has been provided by our acts of Assembly, that, where a defendant fails to answer, the bill may be taken *pro confesso*;(*c*) so here where only one of the defendants has contumaciously neglected to put in a sufficient answer, after his first had been determined to be insufficient, it must be allowable and is essentially necessary, to have the bill taken *pro confesso* as against him alone, so as to enable the plaintiff to proceed safely and with effect against him together with the other defendants.

Whereupon it is *decreed*, that the bill of complaint be and the same is hereby taken *pro confesso* as against the defendant *Thomas Tyson*; and the plaintiffs are allowed further to proceed with their

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(*a*) Child *v.* Brabson, 2 Ves. 110; Turner *v.* Turner, Dick. 316; Davis *v.* Davis, 2 Atk. 24; Darwent *v.* Walton, 2 Atk. 510; Gregor *v.* Ld. Arundel, 8 Ves. 88. (*b*) 1 Fow. Exch. Pra. 199; Royall *v.* Johnson, 1 Rand. 421.—(*c*) 1799, ch. 79, s. 1; Clapham *v.* Clapham, ante, 126.

case, according to the course of the court, in such manner as they may deem proper.

After which the defendants, who had some time previously put in their answers, by their petition prayed, that, as the plaintiffs did not reside within this State, they might be ordered to give security for costs.

20th April, 1829.—Bland, *Chancellor*.—As the origin and principles of the practice in relation to this matter do not appear to be as generally understood as they should be, I shall avail myself of this occasion to speak of the subject more fully than might otherwise be deemed necessary.

At common law a plaintiff was required in all cases to give pledges to prosecute his suit with effect, or to abide the consequences. This however was not, strictly speaking, giving security for costs; because although a plaintiff might be fined for making a false claim, yet costs, by the common law, were not recoverable in any case.(*d*) The pledges to prosecute have, however, long since become obsolete.(*e*) The rule security for costs is applied only against nonresidents; and is of recent origin in the courts of common law of England: so late as the year 1750, in a case in which it was moved, that the plaintiff, who was a merchant residing in France, might be required to give security for costs, it was refused; because, as was said, it would affect trade and be excluding foreigners from obtaining justice.(*f*) Some years afterwards it became a settled general rule to allow the defendant, even after issue joined, to demand security for costs in all cases where the plaintiff resided beyond the jurisdiction of the court; and on the security not being given to have the suit dismissed.(*g*) But a resident plaintiff, as it would seem, cannot be required to give security for costs merely on account of his poverty.(*h*)

In Maryland a plaintiff was at no time required to give pledges to prosecute; but it appears, that if a nonresident himself applied to sue out original process for the commencement of an action he might be called on to give security for costs,(*i*) and if he did not himself so institute his suit, the attorney employed by him was

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(*d*) 2 Inst. 288.—(*e*) 3 Blac. Com. 274.—(*f*) Lamii *v.* Sewell, 1 Wils. 266; Maxwell *v.* Mayer, 2 Burr. 1026.—(*g*) Denn, ex dim. Lucas *v.* Fulford, 2 Burr. 1177; Parquot *v.* Eling, 1 H. Blac. 106; Fitzgerald *v.* Whitmore, 1 T. R. 362; Carr *v.* Shaw, 6 T. R. 496.—(*h*) Golding *v.* Barlow, Cowp. 24; Tidd. Prac. 478.—(*i*) 1715, ch. 29.

required to put in security for costs.(*j*) By laws, passed since the revolution, it is declared, that in all suits brought by persons not resident of the State, or who may remove out of it, after the commencement of the action, the defendant may lay a rule, at or before the trial court, on the plaintiff to give security for costs; upon the failure to comply with which he may be nonsuited.(*k*) It is evident from these and other legislative enactments, that the rule security for costs as against nonresident, and in some instances against resident plaintiffs, was frequently resorted to in our courts of common law from a very early period.(*l*)

Soon after the chancellorship had become active and important as a *judicial* office in England, it was declared by a statute passed in the year 1393, that the Chancellor, upon any suggestion being found untrue, should have the power to award damages according to his discretion to him who had been so unduly troubled. This statute is said to be the foundation of the authority by which costs in chancery are given in England; and according to which it has been the practice in the Province and State of Maryland, and still continues to be, to give costs in all cases, except only in so far as it has been modified and controlled by the constitution and the acts of Assembly regulating officers' fees.(*m*) In the year 1436, to prevent the vexatious institution of suits in chancery in England for matters determinable by the common law, it was declared by statute, that no *subpœna* should be granted until security was given to satisfy the party grieved for his damages and expenses if the matter of the bill should not be made good.(*n*) This legislative enactment required a plaintiff in chancery in all cases to give security for costs. It is said, however, that this law has by degrees gone out of use or altogether vanished; and that an entirely different

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(*j*) 1715, ch. 29; 1729, ch. 20, s. 2.—(*k*) 1796, ch. 43, s. 12; 1801, ch. 74, s. 9. (*l*) 1768, ch. 29, s. 24; 1794, ch. 54, s. 10; 2 Harr. Ent. 51, 118, 617.—(*m*) 17 Rich. 2, c. 6; Park. His. Co. Chan. 35; 2 Mad. Chan. 543; Kilty's Rep. 224; Declaration Rights, art. 30; 1779, ch. 25; 1826, ch. 247.

"December, 1670, *Ordered*, that upon all rehearings and dismissions the costs paid before rehearing of the business to the defendant, if the business go for the plaintiff, the defendant to pay back the said costs again to the plaintiff; and this order to be observed for the future in this court."

"*Ordered* also, that the register take fees in this court as the officers of this court in England, having one penny sterling for every pound of tobacco; and that he compute fifteen lines to be a sheet, and seven or eight words in each line; and that for every such sheet writing, engrossing, copying, or enrolling, he charge but eight pounds of tobacco, or eight pence sterling."—*Chan. Proc. lib. C. D. fol.* 42.

(*n*) 15 Hen. 6, c. 4.

course has long prevailed in England.(*o*) This English statute never was in force in Maryland; but here as in England security for costs might always have been required of a nonresident plaintiff.(*p*)

In general the name, description, and place of abode of the plaintiff should be set forth in the bill, that the court and defendants may know where to resort to compel obedience to any order or process, and particularly for payment of any costs which may be awarded against the plaintiff, or to punish any improper conduct in the course of the suit.(*q*)

As to the cases in which a plaintiff may be required to give security for costs, it may be regarded as settled, that when it appears upon the face of the bill, that the plaintiff is a nonresident of the State, or where it is shewn that the defendant, before he answers, knows that the plaintiff, who does not belong to the army or navy of the United States, resides beyond the jurisdiction of the court, it is of course, on application, to compel him to give security.(*r*) But if the defendant, being aware of the nonresidence of the plaintiff, answers the bill or applies for time, security will not be required.(*s*) If the plaintiff stiles himself in his bill, of a place where he cannot be found, he must give security for costs.(*t*) If the defendant, at the time of answering, be ignorant of the residency abroad, he may as soon as the fact comes to

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(*o*) 1 Harr. Prac. Chan. 200; 2 Mad. Chan. 543.—(*p*) Kilty's Rep. 62.

JANSY *v.* CLAUSE.—It is alleged by the attorney for the defendant, that the defendant is ready to put in his answer to the plaintiffs' bill, provided the plaintiffs who are foreigners, and live out of the jurisdiction of this province, or their attorney, or some one else for them, will give security to pay such costs of suit as this court shall adjudge in case the said plaintiffs' bill be dismissed.

14*th February*, 1670.—*Per Curiam*.—Whereupon it is ordered that no further proceedings be had in the said cause till such security be given as aforesaid. And afterwards no security having been given as required, the bill was dismissed.—*Chan. Proc. lib. C. D.* 29, 41.

(*q*) 1 Fow. Exch. Pra. 26.—(*r*) 1 Fow. Exch. Pra. 278; Meliorouccliy *v.* Meliorouccliy, 2 Ves. 24; Dick. 147; Anonymous, 10 Ves. 287; Colebrook *v.* Jones, Dick. 154.—(*s*) Craig *v.* Bolton, 2 Bro. C. C. 609.—(*t*) 2 Fow. Exch. Pra. 311; Stackpoole *v.* O'Callaghan, 1 Ball & Bea. 566.

FISHER *v.* KEENE.—The plaintiff's attorney being demanded by this court if he would give security for costs, if, upon hearing of the business, the bill should be dismissed; and he refusing, the complainant having, at present, December 1670, no visible estate in the Province: It was *Ordered* by this court, that the complainant's said bill be dismissed; and that the said Fisher complainant, or Simon Warren his attorney, pay to the defendant the sum of three pounds six shillings and eight pence for costs; and that decree pass out of this court for the same against the said Fisher, or his attorney Simon Warren.—*Chan. Proc. lib. C. D. fol.* 41.

his knowledge, obtain security;(*u*) and the same rule applies where the plaintiff after answer abandons the State and resides abroad.(*v*) But if the defendant after being apprised of the fact, by an insufficient answer, or an answer filed by mistake, or by any proceeding in the case, recognises the plaintiff's right to sue, he cannot obtain security for costs.(*w*) Nor will the plaintiff in a cross bill be required to give security for costs, though residing out of the jurisdiction of the court. Where a *prochein ami* has taken the benefit of the insolvent law, or has been withdrawn and a new one appointed, security may be required for the costs already incurred.(*x*) And where a plaintiff is out of the reach of the process of the court by being under the protection of a foreign ambassador, he may be required to give security.(*y*) The simple fact of the plaintiff having gone abroad, is not a sufficient ground to require security,(*z*) it must appear that he has gone to reside abroad.(*a*) If after answer, it appears by affidavit, that the plaintiff, though gone abroad, intends to return, his family remaining in this State, he will not be compelled to give security for costs.(*b*) If there is a co-plaintiff residing within the jurisdiction, security will not be required from the plaintiff resident abroad, the defendant having security from the resident plaintiffs.(*c*) And although any monarch of a foreign nation with whom the United States are at peace,(*d*) or any one of the States of the Union may be permitted to institute a suit in our courts against any of our citizens; yet such monarch or co-state may be required to give security for costs.(*e*)

It would seem, that in England the demand upon the plaintiff to give security for costs may in all cases be made either by motion or petition setting forth the facts upon which the application is made.(*f*) But here, in cases where the fact of the nonresidence appears upon the face of the bill, it has always been the practice in this court, and certainly is the easiest and best course, to move within the sittings of a term, as at law to lay a rule upon the docket, that the plaintiff be required to give security for costs dur-

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(*u*) Lonergan *v.* Rokeby, Dick. 799.—(*v*) Weeks *v.* Cole, 14 Ves. 518.—(*w*) Dyott *v.* Dyott, 1 Mad. Rep. 186.—(*x*) Pennington *v.* Alvin, 1 Sim. & Stew. 264.—(*y*) Adderly *v.* Smith, Dick. 355.—(*z*) Hoby *v.* Hitchcock, 5 Ves. 699.—(*a*) Green *v.* Charnock, 3 Bro. C. C. 371; Dick. 775.—(*b*) White *v.* Greathead, 15 Ves. 2.—(*c*) Winthorp *v.* Royal Exch. Ass. Comp., Dick. 282; Walker *v.* Easterby, 6 Ves. 612.—(*d*) City of Berne *v.* Bank of England, 9 Ves. 347.—(*e*) 1 Hovend. Sup. to Ves. 149; 1785, ch. 36. (*f*) 2 Harr. Pra. Chan. 60; 2 Mad. Chan. 270.

ing the sittings of the next succeeding term.(*g*) But if the fact of the nonresidence of the plaintiff does not appear upon the face of the bill; or if he has after filing his bill left the State, then the matter must be brought before the court by petition, and a special order obtained, to be served on the plaintiff's solicitor, or, if he has none, to be entered short upon the docket, requiring security for costs to be given, unless cause shewn by a particular day. The form of the security is a recognisance or bond to the State in a penalty sufficient to cover the costs, with surety resident within the state, to be approved by the Chancellor.(*h*)

In this case the bill itself states, that the plaintiffs are nonresidents, and, consequently, the answers and subsequent proceedings of the defendants have amounted to a waiver of the right on their part to lay the plaintiffs under a rule to give security for costs.

Whereupon it is ordered, that the petition of the defendants be and the same is hereby dismissed with costs.

This case was afterwards entered agreed.

(*g*) DENNIS, &c. ASSIGNEES OF D, A BANKRUPT, *v.* GREENBURY.—1714.—Ordered, that security be given for costs in the sum of five thousand pounds of tobacco; bond to be given in six weeks or the bill to be dismissed.—*Chan. Proc. lib. P. L. fol.* 75.

FALCONER *v.* BLAY.—1715.—Bill dismissed with costs for want of security being given according to the rule of last court.—*Chan. Proc. lib. P. L. fol.* 122.

HANBURY *v.* VERNON.—1731.—Upon motion of the defendant's counsel, Ordered that security for costs be given. Edmund Jenings becomes security for the same.—*Chan. Proc. lib. S. R. No.* 2, *fol.* 225.

CHENEY *v.* CHENEY.—1773.—Rule security for costs and fees next court.—*Chan. Proc. lib. W. K. No.* 1, *fol.* 314.

BRYDEN *v.* CHASE.—20th December, 1810.—The plaintiff was a resident of New York. Rule on the plaintiff to give security for costs before the 5th day of February term 1811. Rule enlarged to the fourth day of July term 1811.

THE LORD PROPRIETARY *v.* CARROLL.—1738.—Information, &c.—Upon motion of the defendant's counsel, Ordered, that security for costs be given by next court; the person at whose relation the information is filed being a nonresident.—*Chan. Proc. lib. J. R. No.* 3, *fol.* 465.

(*h*) Upon which there may be as it appears a "*scire facias* against the security for costs on the recognisance," 1763, ch. 18, s. 89; or an attachment as at common law, 2 *Harr. Ent.* 617.

BILLINGSLEA *v.* GILBERT.

The penalty of an injunction bond to stay proceedings at law should be at least double the amount of the debt and interest then due.

An answer to a bill in chancery may, by consent, be received without oath.

On its being shewn, that the dissolution of an injunction has been irregularly and improperly obtained it may be revived.

It appears that the late *William Billingslea*, on the 9th March 1821, filed his bill here praying for an injunction to stay proceedings at law instituted against him by *Jarvis Gilbert;* and in the same month *Billingslea* filed a supplemental bill against *Gilbert*, in like manner praying for an injunction.

19*th March*, 1821.—Kilty, *Chancellor.*—The penalty of the injunction bond, 2000 dollars, is not sufficient. It should be double the amount of the debt which is £600 and the interest thereon, excepting what has been paid.

After which another bond was filed and submitted.

4*th April*, 1821.—Kilty, *Chancellor.*—The penalty of the injunction bond now filed is still insufficient. The interest after deducting the payments made is nearly 1516 dollars. The penalty should be double the aggregate of principal and interest, and the safest way is to make it somewhat more. When the injunction issues it will only be to stay the execution, and not to prevent the having a trial or obtaining a judgment.(*a*)

(*a*) Yance *v.* Short.—1788.—Answer filed; rule on the plaintiff to shew cause on the first day of July next why he should not give better security to prosecute his injunction with effect. Also notice of motion to dissolve the injunction next court.—*Chan. Proc. lib. S. H. H. let. B. fol.* 354.

Sweeny *v.* Rodgers.—1790.—Rule on the complainant to file a new bond with sufficient surety by the 18th of October next, or the injunction be dissolved.—*Chan. Proc. lib. S. H. H. let. C. fol.* 400.

Onion *v.* McComas.—MS. 1812.—Kilty, *Chancellor.*—Where the surety in an injunction bond is, or has become insufficient, as being an infant or having become insolvent, the court will order new security, or that the injunction be dissolved; and, if the court has been imposed on, no time will be allowed to give new security. Such matter may be enquired into by allowing testimony to be taken, and appointing a day for hearing.

Whitney *v.* Muschet, MS. 1808.—Kilty, *Chancellor.*—An injunction bond to stay proceedings at law should state the term at which the judgment was obtained.

Counselman *v.* Gaither, MS. 1810.—Kilty, *Chancellor.*—Ordered that, instead of an injunction bond, on the money appearing to be due by the execution issued, being paid to the register, which he is directed to receive and deposit in the usual manner, an injunction be issued as prayed.

After which a proper and sufficient bond having been filed and approved, an injunction was granted as prayed, and issued accordingly.

The defendant *Gilbert* sent a paper purporting to be his answer by mail directed to the Chancellor; which, although not sworn to, was filed, on the 28th of December 1824, as the defendant's answer. In the month of March 1825 the plaintiff *Billingslea* was taken with a severe illness, and his health continued from that time to be very bad, he being often confined to his bed, and his mind becoming very much impaired, until the following month of December, when he died. At the July term of the year 1825, the defendant entered upon the docket notice of a motion to dissolve the injunction at the next term, unless cause shewn; and accordingly, after the fourth day of the then next succeeding term, no one appearing to shew cause, it was dissolved under the rule. After which, on the 10th of July 1827, it appears by an entry on the docket, that the suit was dismissed by order of the complainant's solicitor. On the 7th of April 1829 *Elizabeth Billingslea*, as administratrix of the late plaintiff, filed her petition, on oath, stating these circumstances, and averring, that the dissolution of the injunction had been obtained by fraudulent practices, and praying that it and the suit might be reinstated; and for general relief.

7th April, 1829.—Bland, *Chancellor*.—Ordered, that the matter of this petition stand for hearing on the 24th instant; and that the parties be permitted to take testimony before any justice of the peace to be read at the hearing on giving two days' notice as usual; and it is further ordered, that the injunction in the petition mentioned be and the same is hereby revived until the said hearing or further order. Provided, that a copy of this order, together with a copy of the petition be served on *Jarvis Gilbert* on or before the fourteenth instant.

After which the case was again brought before the court.

27th April, 1829.—Bland, *Chancellor*.—The matter of the petition of *Elizabeth Billingslea* standing ready for hearing, and the solicitors of the parties having been fully heard, the proceedings were read and considered.

There can be no doubt, that the answer of a defendant may be received by consent without oath. It is every day's practice to do so: but the consent of the plaintiff must be expressly given in

writing by himself or his solicitor; or it must be shewn as a necessary inference from some act of his which clearly implies, that he knew a paper purporting to be an answer, not sworn to, had been filed. As in this case, if the plaintiff had appeared on the notice of motion to dissolve the injunction and opposed it, without objecting to the answer on account of its not having been sworn to, he would have been precluded from making such an objection at any time thereafter; because of the manifest waiver of his right to have an answer on oath. But this defendant did not appear in opposition to the motion to dissolve the injunction; and it has not been shewn that he ever, either expressly or impliedly, consented to receive the defendant's answer to his bill without its being verified by an oath.

At the time when the notice of the motion to dissolve the injunction was entered on the docket, and, from that time until it was made absolute, it appears, that the plaintiff was in a state of health, which rendered it at least doubtful, whether he could have bound himself by any consent in relation to this suit; or have attended to it with that judgment and discretion which men usually pay, and ought to be permitted to bestow upon their own affairs.(*a*) Therefore upon consideration of all the circumstances, I am of opinion, that the dissolution of the injunction was irregularly and improperly obtained. The suit having abated after that time by the death of the plaintiff, the docket entry, that it was dismissed by order of the complainant's solicitor, is manifestly erroneous; because there was then, in fact, no such suit depending which could have been so dismissed. But, even if there had been a suit depending, a general dismissal, without saying any thing of the injunction, would not have amounted to a dissolution of it; nor would the death of either party, by which the suit became abated, operate as a dissolution of the injunction.(*b*)

Whereupon it is ordered, that the injunction heretofore granted be and the same is hereby revived and reestablished in full force until further order. And the defendant, the petitioner, or the legal representatives of the late plaintiff upon whom his interest in the suit has devolved, are hereby permitted, without prejudice from this order or any proceedings heretofore had in this suit, either to revive the

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(*a*) Kemp *v.* Squire, 1 Ves. 206.—(*b*) Griffith *v.* Bronaugh, ante, 547.

same, or to have the injunction properly and regularly dissolved according to the course of this court.

After which the suit was regularly revived by bill; and the case was referred to arbitrators, who returned an award, upon which, on the 6th of August 1832, a final decree was passed, which closed the case.

DUVALL *v.* WATERS.

The distinction between waste and trespass as regards the proceeding by injunction. The preventive and corrective common law remedy for waste. The writ of *estrepement* to prevent waste associated with an action to try the right.

An injunction to stay waste may be granted in a variety of cases in which an action of waste will not lie. And the court will, in many cases, exercise a conservative power over property, because of there being no mode of obtaining adequate relief at law.

In *England*, if the injunction bill states and admits, that the defendant asserts and relies upon what he alleges to be a valid adverse title in himself, the plaintiff thereby states himself out of court; or if the defendant in his answer positively denies the plaintiff's title, the injunction will be refused, or, having been granted, will, on the coming in of such an answer, be dissolved.

But in *Maryland*, if the plaintiff, by his bill for an injunction, can and does put the title in issue here; or, if he states, that he has *actually* brought an action at law to try the right, he may have an injunction to stay waste, pending the suit here, or the action at law; and, such injunction will not be dissolved on the coming in of an answer which denies the plaintiff's right. If however, after he has filed such a bill here to try the right, he wishes to obtain an injunction to stay waste, he should apply for it by petition in the same case, and not by a separate bill.

An injunction to stay waste, pending a suit, does not restrain the defendant from cultivating, or making any of the ordinary uses of the land.

A conveyance, shewn to be fraudulent, declared to be void as against creditors.

The title to land sold under a *fieri facias* passes by the sale; but there must be some written, and recorded evidence of the sale; such as a return to the execution under which the sale was made.

Where lands have been sold under a *fieri facias*, the sheriff should, in his return, sufficiently describe the land sold by him.

This bill was filed, on the 26th of February 1827, by *Charles Duvall*, against *Nathan Waters*, *Nathan I. Waters*, and *Samuel Ratcliff*. It alleged, that *Samuel Peach* had obtained a judgment at law against *Nathan Waters* upon which he had sued out a *fieri*

facias, by which the lands in question were taken and sold, as the property of the defendant *Nathan Waters;* and this plaintiff became the purchaser; that *Nathan Waters* had, with intent to defraud his creditors, without any valuable consideration, previously conveyed those lands to the defendants *Nathan I. Waters* and *Samuel Ratcliff*. Whereupon it was prayed, that the conveyance might be set aside as fraudulent and void. The defendants put in their answers to this bill; and commissions were issued and testimony collected. All the material particulars of this case are stated by the Chancellor in delivering his opinion on pronouncing the final decree.

On the 18th of July 1827 this plaintiff filed another bill here against these same defendants, reciting the nature and pendency of the former bill; and alleging, that, since the institution of that suit, the defendants had been committing great waste, by cutting large quantities of timber, with a view of removing it from the land; and by destroying the wood. Whereupon the plaintiff prayed for an injunction commanding the defendants not to commit further waste by cutting, or removing from the lands any timber; or by destroying the wood; and, not to do any act that might be in any wise prejudicial to the inheritance; and for general relief. Which injunction was granted as prayed. The defendants put in an answer to this bill, in which they averred, that the conveyance was made for a good and valuable consideration; and in short denied the plaintiff's title, and all the material facts upon which his equity rested; and thereupon gave notice of a motion to dissolve.

1*st October*, 1827.—Bland, *Chancellor*.—The motion to dissolve the injunction standing ready for hearing, the solicitors of the parties were heard and the proceedings read and considered.

It has been urged, in support of this motion, that this was not merely and properly a case of *waste*, but an injunction, in restraint of *trespass*, granted at the instance of a plaintiff who claimed title; which title had been directly and positively denied by the defendants. And that according to the well established law of this court, as deduced from the *English* authorities, no such injunction could be granted or continued where the title of the plaintiff, as in this instance, was admitted to be in dispute, or was altogether denied by the defendant in his answer. This objection is certainly well founded upon the principles of the *English* law; but it is otherwise according to the law of *Maryland*.

This is the first instance, since I have been here, in which the correctness of this peculiar species of injunction has been called in question; and as its origin and nature seem to have fallen into some degree of obscurity; it may be well to take a larger view of the subject than might otherwise be deemed necessary.

The terms *waste* and *trespass* are very often used to designate injuries to property of the identical same nature. The cutting of a timber tree, or the pulling down of a house, may be an act entirely lawful; or it may be an act of waste, or of trespass; and, that not because of any peculiarity in the act itself; but, because of the party, by whom it may have been done, having an absolute title, a limited estate, or no right whatever. The absolute owner of an estate in fee simple, without any incumbrance, or charge upon it, has an uncontrollable power to dispose of it as he may think proper; and can be, in no way, held accountable, as a waster or trespasser, for any thing he may do with the trees, houses, or soil of his lands. If he who does such an act has only a particular estate, as a tenancy for life or years, it is properly denominated *waste;* but, if he has no right whatever, it is then said to be a *trespass.* In general, when any permanent or lasting injury is done, by the holder of the particular estate, to the inheritance, or to the prejudice of any one who has an interest in the inheritance, it is properly called waste; as where timber trees are felled, or houses are destroyed by a tenant for life or years; or by a mortgagor or mortgagee in possession; or by a tenant in fee simple, where the State has reserved to itself an interest in the trees, &c. for the use of the public.(*a*)

(*a*) Although in *England* the cutting of timber, by a tenant in fee simple, cannot be deemed waste; yet if the public has an interest in the forest trees, or they are reserved for public use, as for ship building, or the like, it is then held to be waste to fell such trees; and the tenant in fee simple, may be restrained from cutting them by injunction.—*Jacob L. Dict. verb. Waste.—Bishop of Winchester v. Wolgar*, 3 *Swan.* 493, *note.* By a clause in the colonial charter of Massachusetts; and, by several acts of parliament, all *white pine trees* of the diameter of twenty-four inches and upwards, of twelve inches from the ground, growing in Maine, New Hampshire, Rhode Island, Connecticut, New York, and New Jersey, were, under the colonial government, reserved to the use of the crown for masting the royal navy. This white pine, the ancient and majestic inhabitant of the North American forest, says Michaux, is still the loftiest and most valuable of their productions, and its summit is seen at an immense, distance aspiring towards heaven, in some instances to the height of one hundred and eighty feet from the ground, and far above the heads of the surrounding trees. The felling of any of these white pines was prohibited by a

In general *waste* is the abuse, or destructive use of property by him who has not an absolute unqualified title. And in general *trespass* is an injury, or use, without authority, of the property of another, by one who has no right whatever.

At common law, if the owner of the inheritance had good reason to believe, that a tenant in dower, or by the courtesy, or a guardian designed to commit waste, he might, before any waste was done, have a *prohibition* directed to the sheriff, commanding him to prevent it from being done; and in execution of this writ of *prohibition*, the sheriff might, if necessary, call to his aid the *posse comitatus*. This writ was extended, by a statute passed in the year 1267, to tenants for life and for years: and afterwards, in 1285, it was taken away, and another form of writ given in its place; but when the court of chancery first granted injunctions, it seems to have taken its jurisdiction from this writ of *prohibition* of waste.(*b*)

After waste had been actually committed, the ancient corrective remedy, in a court of common law, was by a writ of waste, for the recovery of the place wasted and treble damages, as a compensation for the injury done to the inheritance.(*c*) There were, however, several cases to which the writ of waste did not extend; and as to such cases, the party was left without any remedy at common law. The action of waste could only have been brought by him who had the immediate reversion or remainder, to the disinheritance of whom the waste was always alleged to have been committed; and therefore, if a lease had been made to A for life or years, remainder to B for life; and A committed waste, the action could not be brought by him, in reversion or remainder, so long as

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heavy penalty, made recoverable in the colonial courts of Vice Admiralty, without a trial by jury. The claims of right to these trees, and the execution of the laws for their preservation, produced much irritation among the colonists; insomuch so, that the controversies respecting them, in those colonies to which the statutory prohibition of felling them extended, may be considered as some among the minor causes of the revolution.—9 *Anne*, *c.* 17; 8 *Geo.* 1, *c.* 12; 2 *Geo.* 2. *c.* 35; 1 *Chal. Opin. Em. Law*, 111, 116, 119, 137; 2 *Hutch. His. Mass.* 228; 2 *Belk. N. Hamp.* 28, 89, 128; *Michaux's Sylva*, *art. White Pine*.—Since the revolution Congress have deemed it expedient to make similar reservations of the *Live Oak*, and *Red Cedar*, growing on the public lands, for the use of the navy.—1*st March*, 1817, *ch.* 22; 2*d March*, 1831, *ch.* 65.

(*b*) Co. Litt. 53; 2 Inst. 299, 389; 52 Hen. 3, c. 23; 13 Edw. 1, c. 14; Kilt. Rep. 209, 212; Jefferson *v.* Bishop of Durham, 1 Bos. & Pul. 108, 121; Goodeson *v.* Gallatin, Dick. 455.—(*c*) Co. Litt. 53; 2 Inst. 300.

the life estate of B continued. But the intervening life estate only suspended the remedy; for, after its termination, the reversioner, or remainderman might then bring his action against A for the waste done before that time.(*d*) Nor could any one maintain this action unless he had the estate of inheritance in him at the time the waste was committed; nor could it be sustained against an executor, for waste committed by his testator, it being a wrong which died with the person; nor could one coparcener bring an action of waste against another; although one joint tenant or tenant in common might have a writ of waste against his cotenant, compelling him either to make partition, and take the place wasted as his own share, or to give security not to commit any further waste.(*e*)

At the common law there was no process by which a threatened *trespass* upon a real estate, however great or irreparable, could be prevented. After the act was done the injured owner might bring his action of trespass against the wrongdoer, and recover satisfaction in damages; but, the common law gave him no means of preventing the execution of the designs and threats of any one, whose declared and settled purpose was to commit a trespass upon his lands. If however the claimant was not in possession, and he thought proper to bring an action to establish his right, and recover the estate; then, and in aid of such suit, and to prevent any injury from being done to the property, pending the controversy, the common law gave the writ of *estrepement*.(*f*) It would seem, that originally this writ could only be used as an aid to a real action for the recovery of the land itself; but, its scope having been extended by statute, it was afterwards used in connexion with actions in which no land was demanded, as in actions of waste, trespass, &c. It was not, however, allowed to be associated with a suit for partition; because the tenants, being both of them in possession, there was no reason why one should be restrained and not the other. A writ of *estrepement* might be sued out at the same time, and together with the original writ, commencing the action; and that too, in those cases where damages for waste done, pending the action, might be recovered; because it was injurious to the commonwealth that waste should be done, and peradventure he who committed it might not be able to satisfy the plaintiff his full damages.(*g*)

(*d*) Co. Litt. 53; Clifton's Case, 5 Co. 76.—(*e*) 2 Inst. 302, 305, 403; 3 Blac. Com. 227.—(*f*) Jacob. L. Dic. verb. Estrepement.—(*g*) 2 Inst. 328.

The writ of *estrepement* is certainly a preventive remedy, and so far it is analogous to a writ of *prohibition*, by which a tenant in dower, or by the courtesy might be prevented from doing waste. But it is more; it is also a remedial and corrective remedy; because, the holder of land may not only be prevented from doing waste; but if he should do any notwithstanding the prohibition, the plaintiff may recover damages for such waste, even up to the time when possession shall be delivered to him. This writ has some other peculiar traits of character. It can never be brought into action independently and alone; it must always be associated with another as its leader; to which it acts as an auxiliary, whose fortunes it must follow, and to whose final fate it must submit. If it emanates, as it may, at the same time and together with its chief, from the chancery office, it is then called an *original;* but if it be awarded by the court, in which the action is depending, as it may, it is then called a *judicial* writ of estrepement. This writ, as its very name distinctly imports, is always intended to stay *waste*. It is no where spoken of as a means by which a mere *trespass* may be prevented; in all its modifications, it is continually treated as a remedy against *waste*.(*h*) But in a writ of right, and in all the other actions, except a writ of waste, to which an *estrepement* is called in as an auxiliary, there is not any privity of title whatever between the parties to the suit; all such privity being expressly disavowed. The plaintiff asserts, and calls for the vindication of his absolute title against an unqualified wrongdoer, who he complains of as a disseizor, ejector, or trespasser. And, therefore, in all such cases, the injury which it is the office of the writ of estrepement to prevent, is not properly *waste*, founded on privity of title, as between a reversioner and a particular tenant; but literally a *trespass*, in the chancery acceptation of that term; and not a mere abusive use of that which a lawful holder had a right to enjoy.

Where the title and the rights of the parties are admitted, there can be no mistake; and therefore, there should be no confusion or misapplication of these terms *waste* and *trespass*. But, in the *English* authorities, there is not the same distinctness, in the application of them, to any such injuries to the inheritance, where the rights of the parties are disputed and put in litigation. If the party asserts his title to an estate, by an action at law, such acts, with

(*h*) F. N. B. 139; 2 Inst. 328; 3 Blac. Com. 225; Jacob. L. Dic. verb. Estrepement.

reference to a presumption in favour of the validity of his title pending the suit, are said to be *waste;* but if he asks, in a court of chancery, to have the doing of such acts prevented by an injunction, they are denominated *trespasses.*(*i*) This difference in characterizing the same injurious acts, when proposed to be prohibited by an *estrepement*, as *waste;* and when proposed to be restrained by injunction as *trespass*, has been attended with some confusion. And therefore in relation to the peculiar species of injunctions, now under consideration, all such acts as would be deemed *waste*, when done by an admitted particular tenant, if done after the institution of any suit involving the title, or of a suit for partition, it may be well to denominate *eventual waste.*

The judicial records of the State, and the acts of Assembly regulating officers' fees shew, that the writ of *waste* as well as the writ of *estrepement* were at one time in common use in *Maryland.*(*j*) But here, as in *England*, these writs have fallen into disuse, and are now seldom, or never brought, having given way to the more easy and expeditious remedy by an action upon the case in nature of waste at common law; by which the plaintiff obtains satisfaction for the injury done to his inheritance by a recovery of damages alone;(*k*) and in *Maryland* to an injunction from chancery which performs the office of a writ of *estrepement.*

The whole subject of waste, in *Maryland*, seems to have passed, almost altogether, from the cognizance of the courts of common law to that of the court of chancery; and the shifting of this matter so entirely, from the one jurisdiction to the other, may be attributed to the nature of the injury requiring redress; to the different constitutions of the tribunals; and to their peculiar modes of proceeding. Waste is a wrong which cannot always be duly estimated and remunerated in damages; it is an injury which requires to be met, in its onset, or earliest approaches, by a strong and decisive preventive remedy, acting with a promptness almost amounting to surprise; and yet affording to the party restrained a speedy hearing. No adequate remedy of this kind, it is evident, can be obtained from a court of common law, open only at short intervals during the year; acting from term to term; and

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(*i*) Eden. Inj. 136; Mitchell *v.* Dors, 6 Ves. 147; Crockford *v.* Alexander, 15 Ves. 138; Mogg *v.* Mogg, Dick. 670.—(*j*) 2 Harr. Ent. 149, 800; Adams *v.* Brereton, 3 H. & J. 124; 1763, ch. 18, s. 89 & 94; 1779, ch. 25, s. 2.—(*k*) 3 Blac. Com. 227; Greene *v.* Cole, 2 Saund. 252, note 7; White *v.* Wagner, 4 H. & J. 373; McLaughlin *v.* Long, 5 H. & J. 113.

limited to a given set of technical forms of proceeding. Hence it is, that the remedy has been so constantly, in modern times, sought in the court of chancery, which is always open, constantly accessible, and is capable of moving with an energy and despatch called for by the emergency, and suited to the peculiar nature of the case.

In general an injunction may be obtained, in this State as in *England*, to stay waste in all cases where an action of waste would lie at common law, whether there be any privity of title or not;(*l*) and in a variety of others in which no such action could be brought, even where there was a subsisting privity of title or contract between the parties. A mere threat to commit waste is a sufficient foundation for an injunction before any waste has been actually done.(*m*) And an injunction may be granted where no account of damages could be claimed; or where the waste done is so insignificant that there could be no recovery of damages at law.(*n*) It may be granted in favour of a child *en ventre sa mere*;(*o*) in favour of trustees to preserve a contingent remainder, before the contingent remainderman has come *in esse*;(*p*) in favour of any one entitled to a contingent or executory estate of inheritance;(*q*) and in favour of a remainderman or reversioner, where there is an intervening estate for life.(*r*) An injunction may be obtained, in respect of equitable waste, against a tenant in tail after possibility of issue extinct;(*s*) against a tenant for life without impeachment of waste;(*t*) and against a mortgagor or mortgagee in possession.(*u*) An injunction may be granted as between tenants in common, joint tenants, and coparceners, against malicious destruction, or when the tenant committing the waste is insolvent, or is occupying tenant to the plaintiff.(*v*) And so too, where some of the heirs had filed their bill in this court against the rest to obtain a partition according to the act to direct descents, and one of the heirs, who was in possession, was committing waste; upon a

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(*l*) The Mayor & Com. Norwich *v.* Johnson, 3 Mod. 90; S. C. 2 Show. 457. (*m*) Gibson *v.* Smith, 2 Atk. 183; Hannay *v.* McEntire, 11 Ves. 54; Coffin *v.* Coffin, Jacob. 70.—(*n*) The Universities of Ox. & Cam. *v.* Richardson, 6 Ves. 706; The Keepers, &c. of Harrow School *v.* Alderton, 2 Bos. & Pul. 86.—(*o*) Robinson *v.* Litton, 3 Atk. 211.—(*p*) Garth *v.* Cotton, 3 Atk. 754.—(*q*) Bewick *v.* Whitfield, 3 P. Will. 268, note; Hayward *v.* Stillingfleet, 1 Atk. 422.—(*r*) Bewick *v.* Whitfield, 3 P. Will. 268, note; Farrant *v.* Lovel, 3 Atk. 723.—(*s*) Abraham *v.* Bubb, 2 Freem. 53.—(*t*) Lord Bernard's Case, Prec. Chan. 454.—(*u*) Farrant *v.* Lovel, 3 Atk. 723; Humphreys *v.* Harrison, 1 Jac. & Walk. 561.—(*v*) Smallman *v.* Onions, 3 Bro. C. C. 621; Hole *v.* Thomas, 7 Ves. 589; Twort *v.* Twort, 16 Ves. 128.

representation of the fact, by the trustee appointed to make sale of the lands for the purpose of effecting a partition, he was restrained by injunction.(*w*) When the bill is for an injunction to stay further waste, and waste has been already committed, the court, to prevent a double suit, will decree an account and satisfaction for what is past, and not oblige the plaintiff to bring an action at law as well as a bill in equity; but such decree for the past is only given as an incident to the injunction, to obtain which the plaintiff was under a necessity of coming into chancery: and, consequently, it may be regarded as a general rule, to which there are few exceptions, that when no injunction is, or can be asked for or granted, a bill to have an account of past waste, and nothing more, cannot be sustained, the proper remedy being at law.(*x*)

It appears, that the *English* Court of Chancery had steadily confined itself in granting relief against waste, to those cases only where there was some subsisting privity of title or contract between the parties, until about the year 1785; since which time it has gone one step further, and granted injunctions against strangers to stay trespass, in strong cases of destruction or irreparable mischief; or where the irreparable mischief might be completely effected before any trial could be had as to the controverted right. But, at that point, it seems to have come to a stand; not, however, without expressing a regret, that its jurisdiction had not been extended so far as to protect real estate from waste and injury pending a controversy about the title. I have seen no reason to doubt, that the powers of this court in granting injunctions have been always considered as in all respects coextensive with those of the chancery court of *England*.(*y*)

It appears to be even yet the fixed rule of the Court of Chancery of *England*, that the granting of an injunction to stay waste must depend, either upon the fact of there being a privity of title or contract acknowledged by the answer; or an unquestionable legal or equitable title in the plaintiff; as where a purchaser files a bill for specific performance of his contract, suggesting, that the defendant was proceeding to cut timber &c., an injunction may be

(*w*) Clarke *v.* Clarke, MS., 24th January 1822.—(*x*) Jesus College *v.* Bloom, 3 Atk. 262; Eden. Inj. 146.—(*y*) Pillsworth *v.* Hopton, 6 Ves. 51; Mitchell *v.* Dors, 6 Ves. 147; Hanson *v.* Gardiner, 7 Ves. 305; Smith *v.* Collyer, 8 Ves. 89; Courthope *v.* Mapplesden, 10 Ves. 290; Crockford *v.* Alexander, 15 Ves. 138; Norway *v.* Rowe, 19 Ves. 147; Jones *v.* Jones, 3 Meriv. 173.

granted if the contract be stated and admitted. For if the bill states and admits, that the defendant asserts and relies upon what he alleges to be a valid adverse title in himself, the plaintiff thereby states himself out of court, or if the defendant in his answer positively denies the plaintiff's title, the injunction will be refused; or having been granted will, on the coming in of such an answer, be dissolved.(*z*)

It is said, however, in one of the most respectable treatises on pleadings in chancery, that, "pending an ejectment in a court of common law, a court of equity will restrain the tenant in possession from committing waste, by felling timber, ploughing ancient meadow, or otherwise. Against this inconvenience a remedy at the common law was in many cases provided during the pendency of a real action, by the writ of *estrepement;* and when the proceeding by ejectment became the usual mode of trying a title to land, as the writ of *estrepement* did not apply to the case, the courts of equity, proceeding on the same principles, supplied the defect."(*a*) But the only authorities cited in support of what is here said are cases between landlord and tenant, where the title of the plaintiff had not been, and could not be denied by the defendant who confessedly held only as tenant.(*b*) Whence it is evident, that there can be no means of preventing waste from being done upon real estate, in *England*, pending a suit to determine the title, other than the writ of *estrepement;* and that writ, it is said, has fallen into disuse.(*c*)

But in a variety of other cases the *English* Court of Chancery is in the habit of exercising its preventive and conservative powers for the express purpose of preserving the subject of litigation from waste, injury, or total loss, pending the controversy.

In cases of patent rights, where the plaintiff is in possession of the invention, under colour of title, an injunction may be granted pending the proceedings at law to try the right.(*d*) And so, too, where the plaintiff claims the copy-right of a book, an injunction may be granted to prevent publication, during the continuance of a suit at law. In cases of copy-right the jurisdiction is assumed merely for the purpose of making the legal right effectual, which

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(*z*) Pillsworth *v.* Hopton, 6 Ves. 51; Smith *v.* Collyer, 8 Ves. 89; Norway *v.* Rowe, 19 Ves. 147.—(*a*) Mitf. Plea. 136.—(*b*) Lathropp *v.* Marsh, 5 Ves. 259; Pulteney *v.* Shelton, 5 Ves. 260, note; Onslow *v.* ———, 16 Ves. 173.—(*c*) 3 Blac. Com. 227; Calvert *v.* Gason, 2 Scho. & Lefr. 561.—(*d*) The Universities of Ox. & Cam. *v.* Richardson, 6 Ves. 689.

cannot be done by any action for damages, because, if the work is pirated, it is impossible to lay before a jury the whole evidence as to all the publications, which go out to the world, to the plaintiff's prejudice; and therefore, with a view to make the legal right effectual, the publication will be altogether prohibited. Where a fair doubt appears, as to the plaintiff's legal right, the court always directs it to be tried; making some provision in the interim, the best that can be, for the benefit of both parties.(*e*) And on a proper case being presented the court will grant an injunction, and appoint a receiver to preserve personal property while a suit is depending in the ecclesiastical court, although an administration *pendente lite* might be there obtained.(*f*) In general, where personal property, or the rents and profits of real estate in dispute, are in imminent danger of being wasted or lost, a receiver may be appointed to take care of it, for the benefit of all concerned, pending the controversy.(*g*) To accelerate the progress of the suit, as well as for the greater security of the fund, for the benefit of those who may ultimately appear to be entitled to it, money may be ordered to be brought into court where the defendant admits, that he has it in his hands, and that he has no title to it.(*h*) And there are many instances where the court interposes by injunction to secure the enjoyment of specific chattels; either because of their peculiar character; or because, from the nature of the property, it would be difficult or impossible for the plaintiff to have the full benefit of it, unless he could specifically enjoy it.(*i*)

Looking to the general reasoning and principles of those various cases in which the *English* Court of Chancery interposes for the preservation of property, the right to which is in litigation, it does indeed seem strange, that it has so pertinaciously refused an injunction to prevent irreparable mischief, and to put a stop to the further commission of waste upon real estate during the continuance of an action at law to try the right. It is admitted, that there is no good reason why the court should not interfere in such cases. Should it turn out, that the defendant had an unquestionable title, then the granting of such an injunction could only operate temporarily and partially to the prejudice of the free exer-

(*e*) Hogg *v.* Kirby, 8 Ves. 215; Wilkins *v.* Aikin, 17 Ves. 422; Rundell *v.* Murray, Jac. Rep. 311; Act of Congress, 15th February 1819, ch. 19.—(*f*) Atkinson *v.* Henshaw, 2 Ves. & Bea. 85.—(*g*) Powell Mort. 294, note.—(*h*) Gordon *v.* Rothley, 3 Ves. 572; Freeman *v.* Fairlie, 3 Meriv. 29.—(*i*) Fells *v.* Read, 3 Ves. 71; Lady Arundell *v.* Phipps, 10 Ves. 148.

cise of his right of property. But on the other hand, if it should be eventually shewn, that the plaintiff had the title, then, as the injunction turns no one out of possession, nor displaces any thing, it must necessarily leave to the defendant the advantage of fighting the plaintiff with his own property. Upon which, had not the injunction been granted, the most irretrievable destruction might have been perpetrated; acts of waste might have been committed which would deprive the plaintiff of the very substance of his inheritance; mischief might have been done which it would require years to repair; and things might have been torn away or destroyed which it would be difficult or impossible to restore in kind; such as the buildings, fixtures, trees, or other peculiarities about the estate, which a multitude of associated recollections had rendered precious to their owner; but, as a compensation for the loss of which a jury would not give one cent beyond their mere value. A man has a right to secure to himself a property even in his amusements; and, it is not fit in any such cases to cast it to the estimation of people, who may have not the least sympathy with the feelings of the owner, to set a value upon his privileges or his property.(*j*)

The High Court of Chancery of *Maryland* has from the beginning, or certainly for a great length of time past, in this respect, acted more in harmony with its general principles, than the Court of Chancery of *England*, by interposing to prevent waste and destruction in all cases, during the continuance of a suit in which the title to the property has been, or may be brought in question; as well where the subject of litigation was real estate, as where it was mere perishable personalty, or money, or choses in action in the hands of the defendant. A similar and equally extensive application of the writ of injunction to stay waste, appears to have been made by the courts of chancery of *Virginia* and *South Carolina*.(*k*) As I have before observed, there is sufficient evidence of the writ of *estrepement* having been at one time often resorted to in this State; although it has now fallen into total disuse. But even that writ must have been a very tardy and inadequate remedy

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(*j*) Fells *v.* Read, 3 Ves. 70; Smith *v.* Collyer, 8 Ves. 89; Berkely *v.* Brymer, 9 Ves. 356; Lady Arundell *v.* Phipps, 10 Ves. 148; Courthope *v.* Mapplesden, 10 Ves. 291; Lowther *v.* Lord Lowther, 13 Ves. 95; Crockford *v.* Alexander, 15 Ves. 138; Earl Cowper *v.* Baker, 17 Ves. 128; Astley *v.* Weldon, 2 Bos. & Pul. 351; Kimpton *v.* Eve, 2 Ves. & Bea. 349.—(*k*) Harris *v.* Thomas, 1 Hen. & Mun. 18; Shubrick *v.* Guerard, 2 Desau. 616.

compared with an injunction; which is the only judicial proceeding, that seems to be, in all respects, capable, by its promptness and vigor, of preventing irreparable mischief from being done to real estate pending the litigation, by a provoked and desperate defendant.

When this mode of interposing by injunction to stay waste, pending an action at law or a bill in chancery, was first allowed by this court, I have not been able distinctly to ascertain; but it is evident, that it had been considered as a settled course of proceeding under the Provincial Government; for upon an information in chancery, filed on the 13th of April 1775, by the *attorney general*, at the relation of *Josias Bowen*, against *Nicholas Norwood*, to vacate a patent grant for a tract of land, it was alleged, that the defendant in possession was committing great waste; to stay which an injunction was asked and immediately granted until the final hearing.(*l*) I have seen a case of this kind, in which, in the year

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(*l*) THE ATTORNEY GENERAL *v.* NORWOOD.—This was an information filed in the High Court of Chancery, on the 13th of April 1775, at the relation of Josias Bowen to vacate a patent which had been obtained by the father of the defendants, for a tract of land, which the relator had previously caused to be surveyed; but was prevented from obtaining a patent for it, by the father of the defendants having fraudulently contrived previously to get a patent for the same land.

The information states, that in confidence of his being clearly entitled to a patent, the relator had brought his action of ejectment against the father of the defendants; pending which action his certificate was caveated, and the *caveat* ruled good, by reason of Norwood's producing an elder patent; which patent it is averred he had fraudulently obtained; that afterwards the relator's action of ejectment was *non pros'd* with costs; which judgment he superseded; that Norwood, after that, conveyed the land to his son, this defendant Nicholas Norwood; and, by his will, appointed his other son, the defendant Edward Norwood, his executor, and died; that Nicholas Norwood had taken possession of the land, and was committing great waste; and that Edward Norwood had, by *scire facias*, revived the judgment for costs in the action of ejectment, and threatened to sue out execution against the relator.

Upon which the information prayed, that the patent obtained by Norwood might be vacated, and possession of the land delivered; that Nicholas Norwood might, *by an injunction, be restrained from committing waste*, &c.; and that Edward Norwood might be prohibited from proceeding at law.

The relator made affidavit to the truth of the facts set forth in the information; and also gave bond to prosecute as in common cases to stay proceedings at law. Upon which, on the same day, an injunction was granted as prayed.

On the 7th of July 1785, it was decreed, that the injunction be made perpetual, that the patent be vacated, and that the possession be delivered.—*Chanc. Proc. No.* 2, *fol.* 211.—This case is in other respects more fully reported in 2 H. & McH. 201.

COALE *v.* GARRETSON.—This bill was filed, on the 15th of February 1791, by Richard Coale against Job Garretson. It sets forth all the particulars of the plaintiff's case, by which it appears in substance, that on a certificate, bearing date on the 8th of January 1773, he had in April 1775 obtained a patent for a tract of land called

1783, this form of a writ of injunction to stay waste pending an action of ejectment, appears to have been treated as then well established;(*m*) and I have met with another instance in which an

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Coale's Discovery. But that the defendant had, by the fraudulent means therein stated, caused a certificate of survey of the same land to be made on the 17th of June 1772; upon which he had obtained a patent; that afterwards this defendant brought an action of ejectment and obtained a judgment. The bill alleged, that this defendant had been put into possession by the sheriff under a writ of possession; and that he had issued a *ca. sa.* for costs, which this plaintiff had superseded; but it is not averred, or even intimated in the bill, that this defendant had committed, or ever threatened to commit waste. Yet the bill prayed for an injunction to prevent the said Job Garretson from committing any waste on the said tract of land called *Coale's Discovery;* also to prevent the said Garretson from serving the said execution, or from proceeding any further on the said judgment; and for general relief, &c. There was an affidavit, in the usual form, of the truth of the matters set forth; and an injunction bond.

15*th February*, 1791.—Hanson, *Chancellor.*—Issue *subpœna* and injunction to stay execution for costs; but not waste.

The defendant on the 14th of December 1793, put in his answer by which he denied all fraud, and also positively denied the legality and validity of the plaintiff's title, &c.

Some time after which the plaintiff, by his petition on oath, set forth and averred, that the defendant had cut down and carried away wood and timber growing on the land in controversy; and still continued to commit waste and destruction upon the land, &c. Whereupon he prayed for an injunction to stay waste and destruction upon the said tract of land called *Coale's Discovery*, &c.

28*th October*, 1795.—Hanson, *Chancellor.*—Issue injunction to prohibit waste, &c. in *Coale's Discovery*, in Baltimore county, surveyed for Richard Coale agreeably to the prayer of this petition.

After which the case coming on for final hearing on bill, answer and proofs, it was on the 25th of May 1797 decreed, that the injunction be made perpetual, and that the defendant convey the land to the plaintiff. *MS.*—In other respects this case seems to be sufficiently reported in 1 H. & J. 370, 378.

(*m*) Maryland, to wit:—The State of Maryland to Michael Krips, his agents, hirelings and servants, Greeting: Whereas Edward Flannagan of Baltimore county, and Elizabeth his wife have exhibited unto us in our High Court of Chancery their bill of complaint for relief in equity, and to stay the commission of waste in and upon part of a tract of land called Mountenay's Neck lying and being in Baltimore county, pending a certain action of ejectment brought by them the said Edward Flannagan and Elizabeth his wife, against you the said Michael Krips, as tenant in possession of said land, or some part thereof, in the General Court of the Western Shore: We therefore command, and strictly injoin you the said Michael Krips, your agents, hirelings and servants, and every of them to stay, surcease and forbear digging, carrying away and removing the dirt, earth and soil of the said land and premises; or doing or committing any manner of waste, spoil, and destruction thereon, pending the said suit, or until the further order of the High Court of Chancery. Hereof fail not, as you will answer the contrary at your peril.

Witness the Honourable John Rogers, Esquire, Chancellor, this 28th day of April, Anno Domini, 1783. Wm. Hyde, *Reg. Cur. Can.*

See Old Book of Forms, page 13.

injunction was granted in the year 1803, apparently without hesitation, to stay waste until the final judgment in an action of ejectment. In which case, on its being urged that the defendant ought not to be thus deprived of the free use of his property, the court said, that he had no other mode of relieving himself from the restriction than by pressing the action at law to a conclusion as speedily as possible.(*n*) I have met with many other similar cases; but in no one of them does it appear that any objection had been made, grounded upon the principles of the English authorities, against the propriety of granting or continuing the injunction, because the plaintiff had stated, that his title was disputed, or because the defendant had positively denied its validity. And

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(*n*) GITTINGS *v.* DEW.—The bill states, that the plaintiff James Gittings was seized and possessed of several parcels of land in Baltimore county, into a part of which the defendant Robert Dew had wrongfully entered; that the plaintiff had commenced an action of ejectment against the defendant to recover such parts as he had entered upon, which suit was then undetermined; that the defendant was cutting down the timber and other trees thereon and making great waste and destruction, and the plaintiff apprehended would continue to do so. Upon which the bill prayed for a *subpœna* and an injunction, prohibiting the defendant, his agents, &c. from cutting down or carrying away timber trees or other trees or wood growing and being on the land; *and from committing any waste thereon until the final decision and judgment in the ejectment;* or until further order, &c.

14*th January*, 1803.—HANSON, *Chancellor*.—Issue *subpœna* and injunction agreeably to the prayer of this bill.

It does not appear that the defendant ever put in any answer to this bill. But on the petition of the plaintiff, stating that the defendant had committed waste in breach of the injunction, accompanied by an affidavit of Archibald Davis stating the circumstances, an attachment was ordered on the 1st of January 1807 returnable to February term. The attachment having been issued and served, the defendant Dew appeared and filed his answer on oath, to the petition, in which he states, that he had cut some cordwood as alleged; but that the plaintiff had not, as he ought to have done, caused the surveyor to lay down his claim and pretensions; that this defendant had been assured by his counsel, that after the first term to which the injunction was returnable he had a right to cut wood; that under such an impression, and firmly believing as he then did, that the plaintiff had no right to the land, he had cut the cordwood as stated; but in doing so, he had no intention of setting the authority of this court at defiance; and was ignorant that what he had done was wrong.

26*th February*, 1807.—KILTY, *Chancellor*.—The suit at law was to decide title and location, and the injunction to restrain waste until those points were decided. Therefore it is no sufficient answer for the defendant to say that the land was his and the location unascertained. If the plaintiff, at law, is tardy, the defendant must urge him to proceed. In consideration of the excuses contained in the answer, and the plaintiff not pressing for a commitment or fine; it is ordered, that the defendant Robert Dew be discharged from the attachment on paying the costs thereof.

so too in cases of nuisance, although it is necessary in England, that the individuals complaining of the injury should have had their rights first established at law,(o) yet here, where an action or the proper proceeding has been instituted to try the right, an injunction may be granted to prevent the repetition or further continuance of the nuisance until the right has been thus determined at law or in the regular mode.(p)

The writ of injunction in cases of this kind, to stay waste pending a suit to try the right, has, in Maryland, taken the place and performs the office, in all respects, of the ancient writ of estrepement. It is an injunction not founded on any privity of title or contract whatever; it is an attendant upon and an auxiliary of the action at common law, or the suit in this court in which the title has been or may be drawn in question; it follows and shares the

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(o) Mitf. Plea. 144.—(p) Williamson v. Carnan, 1 G. & J. 184.

Pascault v. The Commissioners of Baltimore.—1st *March*, 1797.—Hanson, *Chancellor*.—The motion to dissolve the injunction in this cause issued, being submitted, the bill and answers were by the Chancellor read and considered.

When the bill was presented to him for the purpose of obtaining the injunction, it was not his idea, that this court ought to control the *judgment* of the commissioners. It appeared to him, that whenever they exercise their judgment on a subject, over which the law hath invested them with power, and they determine on an act to which that power is competent, they cannot with propriety be restrained. It was not his province to decide, whether or not a street should be paved, or a sewer repaired, or whether or not the intended act of the commissioners would be beneficial to a majority of the persons to be affected by the act. But he considered the power of this court rightfully exercised, on the application of any person, who is apprehensive of injury, in restraining a proceeding not authorized by law. He conceived, that the power conferred on them by the act of Assembly referred to in the bill does not extend to the removing a pavement already made, which was not even alleged to want repairs, and lowering a street for the avowed purpose of changing the course of waters, against the consent and remonstrance of any individual citizen, whose property is to be thereby affected. The power conferred on them by the aforesaid act of Assembly, is to make, amend, repair, pave, and keep clean streets, alleys and lanes; to make, amend and repair bridges; and amend, and repair sewers; and so long as they bona fide exercise only that power, they will not be restrained by this tribunal.

Now supposing the extent of their power to be only doubtful, and that the complainants on bringing suit at law, and shewing, that they have been injured by the commissioners' completing their intended act, might recover ample damages; it is certainly better, that an unlawful proceeding be prevented, than that recourse be had to a court of law, after the injury is done.

The Chancellor's opinion has not been changed by a perusal of the answers. He regrets, that the point was not argued by the counsel.

It is ordered, that the aforesaid injunction be continued until the final hearing of the cause, or the further order of this court.

fate of that suit, and cannot be dissolved upon an answer, in any way, denying the plaintiff's title, until that suit has been fully determined in favour of the defendant. Like an estrepement, its restrictions do not extend to an inhibition of any ordinary use of the land by the occupying tenant; for he is allowed to cultivate it as usual, and to take wood for fuel, repairing of houses, for fencing and the like, so he does no waste or destruction to the inheritance.

It must, however, be recollected, that there is no instance of this court's ever having interposed by an injunction to prevent a *mere trespass*, not instant and irreparable *where no suit had been instituted, here or in a court of common law, involving the title;* for, against the granting of such an injunction, which does not operate as an auxiliary to a suit to try the right, the same reasons apply here as in England. It does not fall within the jurisdiction of a court of equity to try the validity of mere legal titles; for all such purposes recourse must be had to the ordinary tribunals of the common law. A person can only come here to obtain the interposition of the conservative powers of this court in cases where the common law remedies are inadequate or to which they do not at all apply. If the plaintiff's title is denied, and he acquiesces in the denial by refusing to bring an action at law to have it authenticated and sustained, he can have no ground to ask any relief of this court, founded on a claim which he himself thus shrinks from having judicially investigated, or put into a course of being legally established.

In conclusion I deem it proper to remark, that this mode of applying for this injunction by a separate bill, was irregular and improper; it should have been asked for by a *petition*, filed in this case, without praying for a *subpœna* to bring in defendants who were already before the court. The urgency of the case may be some excuse for the irregularity; but I shall in all cases as far as practicable require parties to pursue the regular and proper course.(*q*) In this instance, however, the injunction seems to have been extended rather beyond the bounds of the case presented by the bill itself; as to so much therefore it will be dissolved, or rather circumscribed within its proper limits.

(*q*) Eden. Inj. 209; Anonymous, 1 Ves. jun. 93; Calvert *v.* Gason, 2 Scho. & Lefr. 561; Coale *v.* Garretson, ante 581, note.

Whereupon it is ordered, that the injunction heretofore granted in this case, in so far as it prohibits the removal of any timber or wood which had been cut and severed from the land prior to the service thereof; and also from cutting and taking away timber or wood necessary for the repairs of buildings or fences, and for the use or proper cultivation of the land, be and the same is hereby dissolved; and that in all other respects the same be and is hereby continued until the final hearing or further order.

After this the original and principal case was brought before the court.

19*th May*, 1829.—BLAND, *Chancellor*.—This case standing ready for hearing, and having been submitted on the notes of the defendants' solicitor, and no one appearing on behalf of the plaintiff before the end of the sittings of the term according to the rules of the court, the proceedings were read and considered.

Samuel Peach, having obtained a judgment at law, in Prince George's county court, against this defendant *Nathan Waters*, sued out a *fieri facias*, which was levied on certain parcels of land as his property; whereupon the sheriff, at April term 1827 of that court, made a return in the following words: "Made by sale to Doctor *Charles Duvall* on the thirtieth day of December eighteen hundred and twenty-six, of all the interest of the defendant in and to the following parcels of land; to wit, one tract of land called *Pastures Enlarged*, containing two hundred acres more or less; one tract of land called *Osbourne's* lot and part of *Pleasant Grove*, containing fifty-two acres more or less; one tract of land called *Duvall's Pleasure*, or part of *Duvall's Pleasure*, containing one hundred and fifty acres more or less; one tract of land called *Teukesbury*, and a part of *Teukesbury* and *Walker's Delight*, containing one hundred and fifty acres more or less; and a tract of land called *Friendship*, containing one hundred and eighty acres, the sum of thirteen hundred and fifty dollars, which has been paid to me by the said *Charles Duvall*, and by me paid to the plaintiff's attorney."

This return constitutes the commencement of the title of the plaintiff upon which he rests his pretensions. He alleges, that the defendant *Nathan Waters*, by a deed bearing date on the 17th of February 1824, conveyed the lands mentioned in this return to *Nathan I. Waters*, and *Samuel Ratcliff*; that *Ratcliff* had conveyed

a part of the same lands to *Nathan I. Waters*, by a deed bearing date on the 29th of August 1825; and that these deeds were made without valuable consideration, and are fraudulent and void. Whereupon he prayed, that they might be set aside and annulled as against him.

The defendants by their answer alleged, that the deeds were made *bona fide*, for a valuable consideration, and they objected, that the return of the sheriff was so defective, that it could give to the plaintiff no title whatever.

If these deeds are really valid, as the defendants contend, there is an end of the matter, since it cannot be necessary to inquire into the correctness of the return for any other purpose than to ascertain how far it is available as passing the property of *Nathan Waters*; which alone was liable to be seized and sold under the *fieri facias*.

The first question then is, whether those deeds were *bona fide* and valid transactions or not? The deed of the 17th of February 1824, which is the principal one, carries upon its face, that which is calculated to awaken suspicion. It deals in comprehensive generalities. Such and such tracts or parcels of land by name, without any particular specification of locations or boundaries; and, all the furniture and plantation utensils, without any schedule of them, are conveyed to the grantees. There is certainly nothing absolutely illegal in this mode of conveying property; but real sellers and purchasers do not commonly deal so loosely. There is usually some other security required, than the purchaser's own bond merely for so large an amount of purchase money as nine thousand one hundred and fifty dollars in return for an *absolute* deed of this kind; and the purchaser too, in most cases, is not content with any thing short of a precise and unequivocal description of the property he has bought and intends honestly to pay for. At the time this deed, of the 17th of February 1824, was made, the defendant *Nathan Waters*, who lived upon this land, had one son and five or six daughters, all of whom were more or less dependent upon him. He was in embarrassed circumstances. His younger daughters lived with him; and his son also, was an inmate of his house, and occasionally worked with him at his trade of a millwright; but it is somewhat doubtful whether his son was then of full age or not; the witnesses differ about the fact. *Samuel Ratcliff*, *William Beck*, and *Philemon Jones*, with their wives, who were his daughters, also lived upon this land, and derived their

subsistence from it. After the date of the conveyance of the 17th of February 1824 to *Nathan I. Waters*, the son, and *Samuel Ratcliff* the son-in-law, *Nathan Waters* continued to hold possession of the land, claiming it as his own, and exercising many unequivocal acts of ownership over it; he sold timber off it, he rented parcels of it, and gave receipts for the rent as due to himself; and he once drove from it his son; who, as well as *Ratcliff*, admitted, after the date of the deed, that they had no right to it. There is no clear unsuspicious proof, that either *Nathan I. Waters* or *Samuel Ratcliff* ever paid to *Nathan Waters* any thing whatever for this land. The one, as his son, and the other, as the husband of one of his daughters, no doubt had his confidence and shared his best affections; and the more so as they were both poor and had no way of accumulating large sums of money.

In short, it is clear, from all the circumstances of this case, that this deed, of the 17th of February 1824, was in truth, made, as *Nathan Waters* himself declared to one of the witnesses, merely "for the purpose of protecting his property until he could pay his debts," and, that it was a conveyance contrived with the express intent to defraud his creditors; or as it is declared in the strong language of the venerable statute of 1570, "not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing, bargaining and chevisance between man and man."(*r*) I shall therefore pronounce both these deeds, for the second must follow the fate of the first, to be utterly void as against this plaintiff if his claim under the return be a sound one.

The next inquiry, therefore, is, as to the validity of the plaintiff's claim. The property in question was sold by the sheriff under and by virtue of a writ of *fieri facias* issued on a judgment obtained in an action at common law by *Samuel Peach* against this defendant *Nathan Waters;* and this plaintiff makes title as the purchaser at that sale. But these defendants object, that the description of the lands as given by the sheriff, in his return to the *fieri facias*, is so vague and uncertain as to convey no valid title to the plaintiff as purchaser. What degree of certainty in the specification of the land taken and sold is necessary to be given by the sheriff, in his return to the *fieri facias* under which the levy was

(*r*) 13 Eliz. c. 5.

made, is a question of importance, and deserves to be carefully considered.

By the common law land was not liable to be taken in execution and sold for the payment of debts. Under a *fieri facias* nothing, according to the common law, could be taken but chattels, moveable property, the industrial fruits of the earth then growing, such as corn, wheat, &c., or leases for years, of which the writ commanded the sheriff to levy the debt, by a sale, converting them into money. The sale of all personal property passing the right without any more solemn act than a mere delivery; a sale and delivery, by the sheriff of such property, was held to be sufficient in all cases to vest a complete and absolute title in the purchaser, without any particular specification of the thing, thus taken and sold. It was, therefore, unnecessary for the sheriff to make any return of a *fieri facias* either for his own justification, or as an evidence of the title of the purchaser of the goods; although the sheriff might be required to make return of such an execution, so as to compel him to shew what he had done towards levying the debt as commanded, and so as to enable the plaintiff, if necessary, to proceed further against the defendant for the recovery of the whole or the residue of his claim.(*s*)

By an English statute passed in the year 1285,(*t*) lands were partially subjected to be taken in execution under an *elegit*, and held until the debt should be levied upon a reasonable price or extent.(*u*) This statute having, however, prescribed no mode of proceeding, nor required of the sheriff any return of the execution; it was held, that what was a reasonable price or extent could only be ascertained by a jury; which inquisition by a jury, it was also held, the sheriff was bound to take and return; because it materially affected the title to the inheritance; and because, where an inquisition was thus required, it was fit and proper, that it should be returned to enable the court to judge of its sufficiency and of the propriety of its being placed upon the same record with the judgment, to which it was the sequel. And hence it became the established law, that all writs of *elegit*, under the statute, should be returned; and that the inquisition and return should be filed as a part of the record of the case. Whence it is evident, that a title by *elegit* must be thus put in writing and recorded.(*v*)

(*s*) Com. Dig. tit. Execution, (C. 7.)—(*t*) West. 2, c. 18.—(*v*) 2 Inst. 394. (*v*) 2 Inst. 396; Dyer. ca. 71, fol. 100; Fulwood's Case, 4 Co. 67; Palmer's Case, 4 Co. 74; Hoe's Case, 5 Co. 90; Underhill *v.* Devereux, 2 Saund. 69, note 2.

This had been introduced as the law of Maryland and was in regular and constant operation,(*w*) when it was declared, by a British statute passed in the year 1732,(*x*) that real estates, situate in the plantations, belonging to any person indebted, should be subject to the like process for selling and disposing of the same towards the satisfaction of debts as personal estate. This British statute appears to have been first introduced as the law of Maryland about the year 1740.(*y*) This statute, however, specified no mode of judicial proceeding, nor designated any form of execution, but, like the previous English statute, under which the proceeding by *elegit* had been framed, it merely declared the rule, leaving its application to be made by the courts of justice in such manner and form as they deemed best.

In Maryland, for the purpose of executing and conforming to this British statute, the writ of *fieri facias* was so altered as to command, that the debt should be levied of "*the lands and tenements*" as well as of the goods and chattels of the defendant. And as an English statute passed in the year 1676,(*z*) and which had been then adopted here, had declared, that no estate or interest in lands, exceeding the term of three years, should be assigned or granted unless by deed or note in writing; and as the acts of Assembly required all conveyances of any estate, for above seven years, in lands to be in writing and recorded ;(*a*) it seems to have been always considered and held, that, although the title to land, as in case of a levy of the *fieri facias* upon personalty, passed by the *sale* made by the sheriff; yet some *written* evidence of the sale was necessary, and that such evidence should be *recorded*. Hence although no inquisition was required, as under the English statute giving the *elegit ;* yet, it seems to have been always understood, that, in all cases, where real estate was levied upon and sold, it was necessary, as an evidence of the title which had been so passed by the sale, that the *fieri facias* should be returned, that the sheriff should specify with sufficient certainty in his return the real estate which he had so sold, and that the return so made by him should be recorded.(*b*)

Upon these general principles it has been laid down, that a return of a sale of lands under a *fieri facias* should regularly, for

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(*w*) Kilty's Rep. 144.—(*x*) 5 Geo. 2, c. 7.—(*y*) Davidson's Lessee *v.* Beatty, 3 H. & McH. 612.—(*z*) 29 Car. 2, c. 3, s. 3.—(*a*) 1715, ch. 47.—(*b*) Bull *v.* Sheredine, 1 H. & J. 410 ; Boring *v.* Lemmon, 5 H. & J. 223 ; Barney *v.* Patterson, 6 H. & J. 204.

the security of purchasers, describe the premises with precision; but it is enough if the description be such as that the property sold may be clearly identified, or sufficiently known and ascertained. It is not necessary, that it should be specified with technical minuteness. Thus if the land be described as, "one tract of land called *Habitation Rock* containing 360 acres more or less, situate in North Hundred, Baltimore county;"(*c*) or as "all that part of the tract of land called *Charles & Benjamin*, which was devised to *E. D. B.* by his father *R. B.*;"(*d*) or by a particular name, as "a tract of land called *Borough Hall*, containing the supposed quantity of 130 acres of land more or less,"(*e*) it is sufficient. Because the sheriff, not having the title deeds within his reach, cannot be presumed to have it in his power to give a more particular description of the land he sells.(*f*) But where it was designated by names common to all similar property, as thus; "to dwelling-house, gristmill, sawmill, and fullingmill, and all other buildings belonging thereunto, with one hundred acres of land joining the said property," the return was held to be defective for want of a specification:(*g*) and so too where the return described the land as "part of *Resurrection Manor*, containing 251 acres more or less;" it was held to be void for uncertainty; because there was nothing by which it could be ascertained whether that part was to be located on the north, south, east, or west, of the whole tract. But in this latter it was admitted, that the return would have been good if it had designated a whole tract by any distinct name or description, such as a tract of land *called* part of a tract; and not as a tract of land *being* part of a tract called *Resurrection Manor*.(*h*)

According to these decisions and principles the return under consideration must be deemed sufficient when taken either altogether or in its several parts. The property sold is described as consisting of several parcels of land. *First*, of "one tract of land called the *Pastures enlarged*." About this there can be no doubt. *Secondly*, of "one tract of land called *Osbourne's* lot and part of

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(*c*) Boring *v.* Lemmon, 5 H. & J. 223.—(*d*) Berry *v.* Griffith, 2 H. & G. 337. (*e*) Thomas's Lessee *v.* Turvey, 1 H. & G. 435.—(*f*) Barney *v.* Patterson, 6 H. & J. 204; Scott *v.* Bruce, 2 H. & G. 262; Berry *v.* Griffith, 2 H. & G. 337; Underhill *v.* Devereux, 2 Saund. 68 f.—(*g*) Williamson *v.* Perkins, 1 H. & J. 449; McElderry *v.* Smith, 2 H. & J. 72; Fitzhugh *v.* Hellen, 3 H. & J. 206.—(*h*) Fenwick *v.* Floyd, 1 H. & G. 172; Purl's Lessee *v.* Duvall, 5 H. & J. 69; Waters *v.* Duvall, 6 G. & J. 76.

Pleasant Grove." This is a designation of one entire tract of land of such a name; it is not, as seems to have been supposed, a sale of an uncertain part of a tract of land called "*Pleasant Grove;*" and therefore the description of this parcel also is sufficiently certain. *Thirdly*, of "one tract of land called *Duvall's Pleasure* or part of *Duvall's Pleasure.*" This is a designation of one whole tract having the one or the other of two names, and is, therefore, a sufficient description. *Fourthly*, of "one tract of land called *Teukesbury* and a part of *Teukesbury* and *Walker's Delight.*" This description also clearly refers to and designates one parcel of land as a whole and not as a part of a tract. And *lastly*, of "a tract of land called *Friendship.*" This description is confessedly sufficient.

Hence it clearly follows, that as this return is sufficiently descriptive in its several parts, it must be so considered as a whole, and when taken altogether. Consequently this plaintiff, who has been thus returned as the purchaser, has thereby obtained such a valid right to the lands held by the defendant *Nathan Waters*, as entitles him to have the fraudulent deeds complained of set aside so far as they at all interfere with his claim.

Whereupon it is decreed, that the said deed bearing date on the 17th day of February 1824, and also the deed bearing date on the 29th day of August 1825, and the records thereof be and the same are hereby set aside and declared and directed to be held, deemed and taken to be utterly null and void to all intents and purposes whatever, so far as the same may interfere with or in any manner affect the right and claim of the said plaintiff *Charles Duvall*, unto the several parcels of land specified in the said return to the said writ of *fieri facias*, by which it appears he became the purchaser thereof as in the proceedings mentioned.

HILL *v.* BOWIE.

An injunction to stay waste pending an action at law is in nature of a writ of *estrepement.* The restriction of such an injunction should in its commencement be coextensive with the plaintiff's pretensions as set forth here or in his suit at law. But after the suit, which had been instituted here or at law to try the right, has been determined, then, according to the nature of that determination, the injunction may be altogether dissolved, or be made perpetual only to the extent to which the plaintiff has recovered.

This bill was filed on the 14th of December 1826, by *Morgan Hill* against *Daniel Bowie.* It states that the plaintiff was in possession of a part of a tract of land called *Grammar's Chance*, to which he had a good title in fee simple; that the defendant had committed waste upon it by cutting down timber trees; and that he, this plaintiff, had brought an action of *quare clausum fregit* against the defendant to try the title to the land; which action was then depending. Whereupon the plaintiff prayed for an injunction to stay waste, &c. An injunction was granted as prayed.

The defendant put in his answer, in which he admitted, that the plaintiff was entitled to a certain part of the tract of land as stated; but he averred, that a part of the same tract of land belonged to his, the defendant's wife, the boundaries of which part had been well ascertained; and the defendant denied, that he had committed any waste as charged by the bill.

On the 11th of September 1828 the plaintiff filed a supplemental bill in which he alleged, that he had obtained a verdict and judgment in his action of trespass; and thereupon prayed, that the injunction might be made perpetual.

The defendant, by his answer to this supplemental bill, admitted, that the plaintiff had recovered a judgment as stated; but averred, that although by the verdict it had been ascertained, that a part of the land, on which it appeared the defendant had trespassed, was the property of the plaintiff; yet it had not ascertained the claim and pretensions of the plaintiff to be as extensive as in his bill he had supposed.

25th February, 1829.—Bland, *Chancellor.*—This case having been submitted on bill and answer, the proceedings were read and considered.

An injunction of this description is in the nature, and in all respects performs the office of the ancient writ of *estrepement.* It

is an attendant upon the action at common law; and, as its inseparable ally, follows its fortunes, and must submit to its fate.(a) The restriction of this kind of injunction, in its commencement, must, from its nature, be coextensive with the pretensions of the plaintiff as made in his bill in equity and action at common law. But if, in that action, the plaintiff fails to recover entirely according to his pretensions, the injunction can be perpetuated to the extent of his recovery only and no further; and upon the same principle, if the plaintiff fails in his action at law altogether, the injunction must be totally dissolved.

In this case it does not distinctly appear, by the proceedings, how far the plaintiff has failed in sustaining his pretensions at law. The defendant by his answer, which is to be taken for true in this mode of submitting the case on bill and answer, avers that the judgment at law does not ascertain the plaintiff's pretensions to be as extensive as in his bill it would appear he supposes. Hence although it must be taken for true, that there is some difference between the extent of the plaintiff's pretensions, which he asked to have protected by an injunction, and his actual recovery, yet that difference is in no manner designated by this vague allegation of the defendant, or by any thing to be found in the proceedings. If the unequivocal extent of the future operation of this injunction be of the importance the parties now seem to consider it, the exact extent of the plaintiff's pretensions, as established by his judgment at law, should have been clearly and distinctly shewn to this court to enable it to limit the injunction accordingly. But a judgment in the general terms that this appears to be, must, without some equally authentic evidence to the contrary, be taken as sufficiently shewing, that the injunction should continue to operate to the full extent of its original scope.

Whereupon it is decreed, that the injunction heretofore granted in this case be and the same is hereby made perpetual; and that the said defendant pay unto the said plaintiff the costs of this suit to be taxed by the register.

(a) Duvall v. Waters, ante, 569.

THE CHANCELLOR'S CASE.

The circumstances and causes which led to the adoption of the thirtieth article of the Declaration of Rights relative to judicial independency. The manner in which the several provisions of that article were introduced and established.

A salary once given to, or which has become legally vested in a Chancellor or judge cannot, during the continuance of his commission, be in any way constitutionally withheld or diminished.

The General Assembly are constitutionally bound to give a salary to a Chancellor or Judge, which shall be secured to him during the continuance of his commission; but they may, by temporary appropriations, or in any other form, provide for the payment of such a salary.

This was a controversy which originated between the House of Delegates and the Senate, at the December session 1824, of the General Assembly of Maryland, respecting the salary of the Chancellor. No charge or imputation, of any kind whatever, was made, by either house, against the Chancellor; nor does it appear, that any complaint had been made, to either house, against him, by any one; except that contained in a petition presented by *Hugh Thompson* to the Senate without any previous application to the Chancellor, praying to be permitted to appeal from an order which had been passed by the Chancellor on the 12th of February 1825, in the case of *McKim* v. *Thompson*. Although the Chancellor was not, in any way, directly made a party to this controversy between the then two houses of the General Assembly; or notified by either house of its existence; yet as his interests were deeply involved, he was thereby virtually made a party; and therefore, at the next session of the General Assembly, he claimed the right to appear, to defend his interests and to maintain his constitutional independency. Accordingly he presented the following memorial, and on the third day after the commencement of the session furnished each member with a printed copy thereof.

By a note to the case of *McKim* v. *Thompson*, (*ante*, 171,) the reader has been referred to this case. The mere principles of law involved in that case can have no bearing upon this. In those respects the two cases can have no sort of connexion with each other. But on an attentive consideration of the various movements in the December session of 1824, of the General Assembly, as carefully stated in the following memorial, it cannot fail to be perceived, that, for some time previous to the passing of the order of the 12th of February 1825, in the case of *McKim* v. *Thompson*,

and at that time, an exceedingly angry excitement prevailed against the Chancellor, who had been appointed no longer than the month of August previous. When or how that excitement originated, or of its authors, or causes, there can be no occasion here to take any notice whatever. For, in the consideration of great constitutional principles, it is proper, that we should, as far as practicable, put aside all personal animosities, jealousies, and griefs, and confine ourselves to the examination of the manner in which the case illustrates the bearing of those great principles. It is therefore only of importance, that it should be here recollected, as a matter of history, that such an excitement did then prevail, and was then in active operation, when *Thompson*, by his petition, complained to the Senate, that the Chancellor's order of the 12th of February 1825 was unjust, and prayed, that some provision should be made for allowing him the benefit of an appeal. It is in these respects only, that the two cases have a connexion and association with each other; and that the facts and circumstances of each should be recollected and taken together for the purpose of enabling the citizen to form a correct estimate of the value of those provisions of our constitution which declare, "that the legislative, executive, and judicial powers of government, ought to be for ever separate and distinct from each other," and "that the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people."

TO THE GENERAL ASSEMBLY OF MARYLAND.

The Memorial of THEODORICK BLAND, *Chancellor of Maryland, respectfully represents*,

That at the last session of the General Assembly of Maryland, the House of Delegates asserted the right to reduce the salary of the Chancellor, either by a direct enactment, *repealing* all laws passed since the year 1785, which had made provision for its payment; or by *refusing to continue* the appropriation that had been made, from time to time, for that purpose during the last six and twenty years. This assertion of right, on the part of the House of Delegates, was opposed by the Senate, on the ground, that when the present Chancellor came into office, his salary having been ascertained by law, and secured to him, by the Declaration of Rights, during the continuance of his commission, the legislature

had not the constitutional power to reduce that salary in any manner whatever, during that period. In consequence of which controversy between the two branches of the legislature, the Chancellor has been totally deprived, since the close of the last session, of the salary which had been thus ascertained and secured to him during the continuance of his commission.

But, however ruinous this controversy may have been, and may still be to the Chancellor individually; yet, when contemplated in all its bearings, his fate becomes a matter of comparatively minor consideration. There are matters involved in it, vitally affecting the constitution, and the safeguards of the people's rights, of infinitely greater moment than the mere personal wrongs of the Chancellor. Its great importance seems to require, and will certainly excuse the giving of a condensed account of its origin, progress and termination.

It had been the uniform practice of the General Assemby, for about twenty years past to pass a bill at each session, by which it was enacted, in general terms, that all acts which would then expire should be continued over to the next session. This had been found an easy and safe mode of continuing all acts of all descriptions, not intended to be repealed or made perpetual. But, at the last session, the subject was taken up with more apparent care, by a bill which proposed to review, and to continue or perpetuate each temporary act by name. On the 9th day of December, 1824, soon after the commencement of the session, it was moved in the House of Delegates, that a committee should be appointed to inquire what laws would expire with that session;(a) and a committee was accordingly appointed; who on the 14th of the same month reported a bill, which, on the 17th, was ordered to a second reading; that is, to be put upon its passage, on the 17th of the next month. But, on the same day, this bill, instead of being suffered to lie over to the appointed time, was recommitted; and did not again make its appearance in the house until the 8th of February following. After which, it was suffered to lie upon the table unnoticed until the very last day of the session,

(a) It may be well here, once for all, to remark, that it has been deemed unnecessary to make any special reference to the journals of either house for what, as in this instance, is stated in this memorial to have been done by the House of Delegates, or by the Senate; because the date given in the text will, in every instance, be found to be of itself a sufficient reference, as all the movements of the two houses are placed upon their respective journals in chronological order.

when it was called up to a second reading; and, while on its passage, it was proposed to insert a clause continuing the act of 1798, ch. 86, which made provision for the payment of the Chancellor's salary; but the proposition was rejected, and the bill thus passed and sent to the Senate. This bill, proposing to continue or perpetuate each temporary act by name, requiring much consideration, and omitting all provision for the payment of the Chancellor's salary, *the general appropriation for which*, during the last twenty-four years had been continued or renewed by each continuing act, was, without hesitation, rejected by the Senate.

It appears, that, on the 14th day of December last, an order was passed by the House of Delegates, calling on the register in chancery, to report "at as early a period as possible, the number of cases remaining in said court undetermined, and the length of time they have remained there; also the number of cases in which the papers have been lost; and the number of decisions made within the two last years, ending on the first of November, 1824." This call was answered on the 20th of the same month. On the answer being read, it was immediately referred to the committee of grievances and courts of justice; which, it would seem, might have been considered the best and most correct disposition that could have been made of it: but, in a few hours after, that reference was reconsidered, and it was referred to a select committee.

In this place it will be necessary to remark, in order duly to appreciate what followed, that by the standing rules, and the long established usages of the House of Delegates, no member is allowed to introduce any bill, upon any subject whatever, without having first obtained leave; and the House having referred that leave to a committee to inquire, to digest the subject, and to report accordingly—and in cases when a petition or memorial is presented to the House, or a communication is made to it, such petition, memorial, or communication may be, and most usually is, as a matter of course, referred to a committee with leave to report by bill, or otherwise. But, in such case, the bill reported must have a direct, and immediate relation to the subject referred to the committee. These two are the only modes by which any bill can be brought into the house.

It does not appear, from the votes and proceedings, what the register did say to the House; but it is difficult to comprehend how any thing which he could have said, in answer to the questions the House had propounded to him, could warrant this special com-

mittee in reporting a bill to alter and abolish a most important part of the constitution; and, also, in reporting a bill for the purpose of *reducing* the Chancellor's salary below what had been constitutionally secured to the Chancellor for the time being, for the last two-and-thirty years. But so it was: this committee to whom the register's communication was referred, found it perfectly applicable to these subjects, and pregnant with both of those very important bills. And, accordingly, on the 21st of January, seemingly as a report in part, they introduced the bill proposing to abolish the office of Chancellor; and on the next day they made a further report, by presenting the bill, by which it was intended to assert and establish the right to cut down the Chancellor's salary at pleasure.

The first of these bills was expressed in these words: "An act to repeal all such parts of the constitution and form of government, as relate to the appointment of a Chancellor.—*Be it enacted by the General Assembly of Maryland*, That all those parts of the constitution and form of government, which require the appointment of a Chancellor be, and the same are hereby repealed." This is the whole of it. There was no clause directing the publication of it for the purpose of apprizing the people, that it was intended to take effect as an alteration of the constitution; without which it could never operate as such; and without which no bill intended as an alteration of the constitution had ever before been reported or passed.

It is no where said, or intimated, whether the ultimate object of this bill was to expunge from our code the whole of the principles of equity or not; or whether it was intended to have no separate court of chancery; or to have such courts, but no Chancellor; or where or how those powers and duties, now held and discharged by the Chancellor, were to be deposited and administered. The first sections of the act of 1804, ch. 55, framed the present six judicial districts; and then the same act declared that the General Court should be abolished. The act which destroyed the General Court began by providing *an ample substitute*. But by this act, for abolishing the office of Chancellor, there would have been an effectual pulling down; but no building up of any kind whatever.

On contemplating this short bill many inquiries suggest themselves; as, whether it would be expedient to eradicate from our code every principle of equity or not? whether, if those principles are to remain, they can be administered easier, more speedily, and

cheaper than they are at present? whether it would be better, and cheaper to have six, or eight chancellors than one chancellor? The late General Court was deemed a grievance and abolished; because, at great expense and inconvenience, it dragged witnesses and jurymen from all parts of the State to the seat of government. But the Court of Chancery, like the Court of Appeals, does not call for witnesses or jurymen from any part of the State. It brings before it nothing but the record, documents, and papers belonging to the case. The lawyers may attend in person, or they may send their arguments in writing. These are some of the thoughts suggested by this bill, on which reflections might be carried out to a considerable extent.

This bill to abolish the office of chancellor was appointed to be read a second time on the 28th of the same month on which it was brought into the House; but, from some cause or other, it was unattended to on that day, and was not called up until the Monday forenoon of the 7th of February, when it was passed, apparently, as a matter of course, without debate, by a vote of 33 to 23, and sent to the Senate—in which house, on the 9th of the same month, it was taken up and read a second and third time, *by a special order*, and rejected. Upon the whole, then, on considering this first one of the suggestions which originated from the communication of the register in chancery, it would seem not to have been intended as a regular attack, but as a mere demonstration, as nothing more than a sort of preparatory feeling of the antagonist.

The second bill from this committee, by which it was intended to *reduce* the salary of the Chancellor, was entitled, "An act to *ascertain and fix* the salary of the Chancellor." The place in which it was intended to express the *amount* of the salary was, as is usual in like cases, left blank, to be filled up on the second reading; and consequently, there was nothing on the face of it, as reported, which involved any constitutional question; or which intimated, that such a one was to be propounded. This bill was ordered to be put on its passage, on the first day of February following; but, that day was suffered to pass by, and it was not called up until the 21st of February; when, by a vote of 36 to 26 the blank was filled up with "*the sum of twenty-two hundred dollars*," as the amount of the Chancellor's salary, and the bill was thus passed, and sent to the Senate.

It will be proper here to recollect, that when the present Chan-

cellor was appointed, his salary, by the act of 1798, ch. 86, then, at least, undeniably in force, was fixed at the sum of *thirty-four hundred* dollars per annum; and that the act of 1792, ch. 76, had, previously to the year 1798, fixed the Chancellor's salary at the sum of *twenty-five hundred and thirty-three* dollars and *thirty-three* cents; and, consequently, by the passage of this bill, the House of Delegates, *practically asserted the power*, at once, to *reduce* the Chancellor's salary below what had been secured to the several Chancellors during the continuance of their commissions for the last thirty-two years.

The Senate conceiving the *reduction* of the Chancellor's salary, in any form, to be a direct violation of the *thirtieth* article of the Declaration of Rights, took up this bill, on the 23d of the same month, and rejected it "*unanimously*." Thus, at this late day of the session, this great constitutional question, relative to the *security* of judicial salaries, was, for the first time, fully and openly presented to the Assembly; and the two Houses were fairly at issue.

On the 25th day of February, the Delegates passed the civil list bill, in which they *reduced* the Chancellor's salary to *twenty-five hundred and thirty-four dollars*. This was rejected by the Senate on the *same ground* of its being an unconstitutional *reduction*. As has been stated, the long special continuing act, omitting to continue the *appropriation* for the payment of the Chancellor's salary, having been passed by the Delegates, and sent to the Senate on the 26th of February, the very last day of the session, was, by that body, read and rejected at once. On the same last day, the Delegates passed a resolution directing, that the Chancellor should be paid the sum of *twenty-five hundred and thirty-three dollars and thirty-three cents and one-third of a cent*, "as a compensation for his services *during the present year*." This was a twofold reduction; it was *less* in amount than the existing salary, and *shorter* in time than during the continuance of his commission. It was doubly objectionable; and, was therefore rejected by the Senate without hesitation.—The Delegates then, immediately introduced and passed a bill continuing all acts, in general terms, which would expire with that session, except the act of 1798, ch. 86, and also except the act of 1797, ch. 71; which bill the Senate, after much hesitation, consented to pass.

On the 26th of February, the Senate sent the following message to the delegates. "*Gentlemen of the House of Delegates*. The Senate have again rejected the bill entitled, An act to pay the civil

list and other expenses of civil government, and also the resolution relative to the Chancellor's salary. We dissented from this bill yesterday, because the salary provided for the Chancellor was in our opinion, *insufficient, and because we considered it a violation of the spirit and intention of the constitution and bill of rights.* It is known to your honourable body, that but a few days ago, the Senate *unanimously* rejected the bill from your house to reduce the salary of the Chancellor, and to-day, *at the very moment we are about closing the session*, when many of our members are absent, who are known to have been opposed to any reduction of the salary of that officer, we are presented with another bill from your house, in which you have thought proper to make no provision to pay the Chancellor *any salary whatever.* If your honourable body will send us a bill to continue in force the act entitled a supplement to the act, entitled, An act for establishing and securing the salary of the Chancellor, we will at once pass the civil list bill; otherwise we cannot, under any circumstances whatever, consent to that bill. The Senate regret the difference of opinion that has arisen between the two houses in relation to this matter; but they owe it to themselves, and to the people of Maryland, after the repeated expressions of their opinion on this subject, to adhere to the course they have taken." This message expresses concisely the opinions of the Senate upon this subject.

On the same day the Delegates returned the general continuing act to the Senate for their reconsideration, with the following message:—"*Gentlemen of the Senate*—We find ourselves driven to the painful necessity of dissenting from the amendment to the continuing act proposed by your honourable body. *We conceive, that we cannot, in conscience, longer continue to the Chancellor the profuse and enormous salary which he now enjoys; we conceive that duty requires us to reduce it, and that there is nothing in our declaration of rights or constitution to inhibit it.* What we have already refused to do directly, by at least four or five different votes of this House, we cannot consent to do indirectly; we stand pledged to our consciences to maintain in every constitutional way, the ground we have occupied. We regret that this proposition has been so often coupled by your house with acts or propositions of a wholly different character, and in no wise dependent upon it. If your House has resolved to reject every continuing act, unless it also continues the acts giving the Chancellor his present salary; and that the whole of the temporary laws of our State, some of which

are of a highly important character, shall be set afloat, because your wishes in regard to the Chancellor's salary cannot be gratified; we must lament that you have adopted what to us seems an extraordinary principle, that the wheels of government shall stand still for the sake of a single individual. It seems to us to amount to a declaration, that you are determined not to concur with us in doing acts which both of us admit to be right and proper, because of a difference of opinion as to other acts of a wholly different character; we cannot be deterred from doing what we believe to be right, lest injurious consequences might result from it. With us, the rule has been adopted and adhered to in this instance, that we must pursue the right, so far as we can ascertain it, and if pernicious consequences flow from it, we must leave it to the people of this State to determine whether it is the consequence of our acts, or of your opposition to them. We therefore again return to you the general continuing act, in the hope that you will reconsider and pass it in its original form *with its excepting clauses.*"

Late in the evening of the same day, the last one of the session, the Senate assented to the general continuing act in the form in which it had been sent to them by the Delegates, with the following message explanatory of their considerations and motives. "*Gentlemen of the House of Delegates*—The Senate have again received the bill entitled an act to continue in force the acts of Assembly which would expire with the present session, and also your accompanying message. The sentiments of the Senate have undergone no change in regard to the subject in controversy between your honourable body and themselves, but actuated alone by a desire to terminate the session, which has been already too long protracted, they have passed the said bill; content to leave the decision of the question to the people of Maryland."

The Delegates, as will be seen by their vote of the 21st of February, passing the bill to reduce the Chancellor's salary to *twenty-two hundred* dollars, could not have rested their pretensions upon any distinction between the act of 1798 and 1792; or upon any notion about the *temporary* nature of the one act, and the *permanent* character of the other; because. the salary awarded to the Chancellor, by that vote, was much *less* than had been allowed to him by either of those acts. And the resolution which they passed and offered to the Senate for fixing the Chancellor's salary at "*the sum of twenty-five hundred and thirty-three dollars and thirty-three cents and one-third of a cent*, as a compensation for his services *during*

the present year;" without any reference to any antecedent law, clearly shows, that they held the Chancellor's salary to be *reducible at their pleasure.*

But, if those acts leave any doubt upon the mind as to the meaning and intention of the Delegates, that doubt must be completely removed by an attentive perusal of their, before recited, message of the 26th of February, returning the general continuing act. In that message there is no such thought expressed as, that they could not constitutionally repeal a permanent act, fixing the Chancellor's salary: it is not there even intimated, that they *only* found themselves at liberty to reduce that salary, *because* it was given by the act of 1798, *which act they believed to be temporary;* nor is it to be inferred, from any thing said or done by the Delegates, as recorded, that they understood, that if the act of 1798 were suffered to expire, the act of 1792 would be virtually revived; and that it was their intention, in that way, to reduce the Chancellor's salary. On the contrary, the Senate having complained, in their message of the 26th of February, that "at the very moment they were about closing the session, when many of their members were absent who were known to have been opposed to any reduction of the salary of that officer, they were presented with another bill from the Delegates, in which they had thought proper to make no provision to pay the Chancellor *any salary whatever.*" The Delegates, in opposition to the Senate, broadly and boldly, without qualification, or restriction, in their message of the same day, say, "we conceive that we cannot in conscience, longer continue to the Chancellor the profuse and enormous salary which he now enjoys; we conceive, that duty requires us to reduce it, *and that there is nothing in our declaration of rights or constitution to inhibit it.*"

Hence, it is most manifest, that the Delegates asserted and maintained the *absolute* right to cut down the Chancellor's salary *at their pleasure*, without limitation or restriction. And, rather than be disappointed in the exercise of that asserted right, they determined to close the session without making any provision whatever for the payment of the Chancellor's salary. On the other hand, the Senate planted themselves upon the constitutional ground, that the salary given to the Chancellor by the act of 1798, ch. 86, was, by the Declaration of Rights, *secured to him during the continuance of his commission;* and, during that period could not be touched.

How it happened that so great a question as this, relative to

the constitutional right of the General Assembly to reduce, or to withhold, at pleasure, the salary of the Chancellor, should have been so postponed, so crowded into the very last day, and thrown in among the fragments and leavings of a long and laborious session, does not very clearly appear. But such was the fact. The special continuing act; the civil list bill; the general continuing act; the separate act and separate resolution for reducing the Chancellor's salary; in short, every act in any way touching upon, or exclusively embracing the subject was, by some unlucky mischance, huddled together at the close of the session, in a manner exceedingly unfriendly to calm deliberation and sound constitutional legislation upon a matter so vitally important.

These considerations, and the deep interest which the Chancellor has in having this great constitutional question fully determined, after the most mature deliberation, have induced him to embrace the earliest opportunity of laying before the General Assembly all those circumstances and arguments which might, in any manner, be likely to aid them in coming to a correct conclusion. The Chancellor is perfectly confident, that his case, so far as it respects himself only, will be heard and investigated with as much care, and as impartial a disposition to do him justice, as would be bestowed upon that of any other of the citizens of Maryland. But upon this occasion, from the peculiar and important nature of his case, he respectfully asks and hopes for more. He flatters himself, that every member of the General Assembly will bestow upon it that close attention which its important bearing upon the independency of the judiciary, upon the separation of the departments of government, and the great interests of the people so very strongly require.(*b*)

(*b*) The injustice done to an individual is sometimes of service to the public. Facts are apt to alarm us more than the most dangerous principles, (*Junius, Let.* 41.) The oppression of an obscure individual gave birth to the famous *habeas corpus* act, 31 Car. 2, c. 2, which is frequently considered as another *magna charta*, (3 *Blac. Com.* 136.) In speaking of constitutional law, we, in this country, always refer to our written constitutions, or fundamental laws paramount to legislative acts. This is a distinction which, as it has been truly said, is not likely to last long in States where the power of the legislature, like that of the British parliament, is omnipotent, (*Coop. Just.* 404.) In Maryland the great facility with which the constitution may be altered gives to the General Assembly almost unlimited power in all respects; and particularly over the executive and judicial departments of the government; and produces too general an indifference to the existing provisions of the constitution.

In the Virginia convention of 1829 it was moved, that a clause should be inserted

It seems, that the formation of the government of our country, like that of England, has not been so much the result of profound political research as of happy coincidences: if much is to be attributed to patriotism, to virtue, and to wisdom, still more must be conceded to fortune, and a favourable concurrence of circumstances. The English American colonists claimed the benefit of the whole of the English code of laws; and especially those parts intended for the preservation of the rights and liberties of the citizen; and they adopted, in substance, the English system of government. In this general translation and adoption, some parts of the code were improved, others neglected; and portions of the system of government were better here; others not so good as in England. The representation of the people, in the popular branch of the colonial legislatures, was every where more equal and better than that of

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in the new constitution providing "a mode in which future amendments shall be made therein," upon which *John Randolph*, among other things, said,

"I do not know a greater calamity that can happen to any nation, than having the foundations of its government unsettled. It would seem as if we were endeavouring to corrupt the people at the fountain head. Sir, the great opprobrium of popular government, is its *instability*. It was this which made the people of our Anglo-Saxon stock cling with such pertinacity to an independent judiciary, as the only means they could find to resist this vice of popular government. By such a provision as this, we are now inviting, and in a manner prompting the people, to be dissatisfied with their government. Sir, there is no need of this. Dissatisfaction will come soon enough. I foretell, and with a confidence surpassed by none I ever felt on any occasion, that those who have been most anxious to destroy the constitution of Virginia, and to substitute in its place this *thing*, will not be more dissatisfied now with the result of our labours, than this new constitution will very shortly be opposed by all the people of the State. Sir, I see no wisdom in making this provision for future changes. You must give governments time to operate on the people, and give the people time to become gradually assimilated to their institutions. Almost any thing is better than this state of perpetual uncertainty. A people may have the best form of government that the wit of man ever devised; and yet, from its uncertainty alone, may, in effect, live under the worst government in the world. I will do nothing to provide for change. I will not agree to any rule of future apportionment, or to any provision for future changes called amendments to the Constitution. They who love change—who delight in public confusion—who wish to feed the cauldron and make it bubble—may vote if they please for future changes. But by what spell—by what formula are you going to bind the people to all future time? *Quis custodiet custodes?* The days of Lycurgus are gone by, when he could swear the people not to alter the Constitution until he should return *animo non revertendi*. I have no favour for this Constitution. I shall vote against its adoption, and I shall advise all the people of my district to set their faces—aye—and their shoulders against it. But if we are to have it—let us not have it with its death warrant in its very face: with the *facies hypocratica*—the sardonic grin of death upon its countenance."

The question on the proposition to insert a clause providing for future amendments was then immediately taken and decided in the negative, ayes, *twenty-five*, noes, *sixty-eight*.—(*Debates Virg. Con. of* 1829, *page* 789.)

the people of England in the House of Commons of their parliament.(*c*)

But the judicial department, in all the colonies, was poorly and badly organized. Yet, for the most part, it was so composed of justices, requiring the concurrence of juries, as to sympathize immediately with the people; and to act, most generally, according to the interests of the colonists, regardless of those of the mother country. After an angry struggle of many years it had been found, that the mere *appellate power of the king in council*, which had been established from the very beginning, was not alone sufficient, so to control the colonial tribunals, as to induce them to execute the acts of navigation and trade. Accordingly, for the purpose of affording judicial protection to the interests of the mother country in the colonies, courts of *vice-admiralty*, with jurisdiction over each colony, were finally established about the year 1700; by whose powers the acts of trade were punctually executed. The judges of these courts were *appointed* and *paid* by the king *during pleasure;* and, were besides allowed sundry fees and perquisites of office. When England attempted to lay *internal* taxes upon the colonies, jurisdiction in cases arising under the laws passed for that purpose was given to those *admiralty tribunals*, in like manner as had been done in cases of *external* revenue.(*d*)

(*c*) "The whole fabric of English liberty rose step by step, through much toil, and many sacrifices; each generation adding some new security to the work, and trusting that posterity would perfect the labour as well as enjoy the reward. A time perhaps was even then foreseen, in the visions of generous hope, by the brave knights of parliament, and by the sober sages of justice, when the proudest ministers of the crown should recoil from those barriers, which were then pushed aside with impunity."—(2 *Hal. Mid. Ages*, 179, *Phil. edit.*)

(*d*) The navigation acts, first introduced, in the year 1651 by the famous Long Parliament, with the intention of securing to England a monopoly of the trade of her colonies, (3 *Godw. Com. Eng.* 382; 1 *Blac. Com.* 418; *Pown. Adm. Colo.* 123, *4th edition*, 1768;) being very injurious to their interests were warmly opposed by them; insomuch so, that those laws remained almost as a dead letter, (*Pown. Adm. Colo.* 109,) until, with a view to sustain the supremacy and monopoly of the mother country, a statute was passed in the year 1696, (7 & 8 *W.* 3, *c.* 22, *s.* 7,) sanctioning the establishment of vice-admiralty courts in the colonies; which tribunals, although some extensions of their jurisdiction were for a time disputed, it seems to have been finally admitted, about the year 1700, might lawfully take cognizance of all cases arising under the statutes passed by the parliament of England for the regulation of the *external* trade of this country, (2 *Chal. Opin. Em. Law*, 187, 193; 2 *Hutch. His. Mass.* 74, 78.)

Before the revolution commenced there had been established a vice-admiralty court for New Hampshire; another for Massachusetts and Rhode Island, (*Chal. Pol.*

To oppose this attempt to lay *internal taxes* upon America, a colonial Congress was convened at New York, on the 7th of Octo-

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An. 282; 2 *Chal. Opin. Em. Law*, 208;) a third for Connecticut, New York, and New Jersey, (1 *Smith's His. N. York*, 383;) a fourth for Pennsylvania and Delaware, (2 *Chal. Opin. Em. Law*, 190;) a fifth for Maryland, (1715, *ch.* 48, *s.* 7; 1763, *ch.* 18, *s.* 97 *&* 98; *Kilt. Rep.* 163;) a sixth for Virginia, (3 *Virg. Stat.* 178;) a seventh for North Carolina, (1 *Chal. Opin. Em. Law*, 278;) an eighth for South Carolina, (6 *State Trials*, 157,) and a ninth for Georgia, (*Stokes' View Brit. Col.* 135.) These vice-admiralty courts were not only invested with authority to take cognizance of the ordinary *instance* and *prize cases;* but also with jurisdiction, according to the course of admiralty proceeding, without a jury, in all revenue cases; and of all prosecutions for the breach of the laws of navigation and trade; and also of the statutes for the preservation of pine trees for the use of the navy, (2 *Hutch. His. Mass.* 228; *Pown. Adm. Colo.* 312; 1 *Chal. Opin. Em. Law*, 111, 119; 9 *Anne*, *c.* 17; 8 *Geo.* 1, *c.* 12, *&* 2 *Geo.* 2, *c.* 35.) The colonists insisted, that their superior courts of common law had a superintending power, similar to that exercised by the English courts of Westminster Hall, to control and check the undue extension of the jurisdiction of these Vice Admiralty courts by writs of *prohibition;* but this was a controverted point which was never finally settled.—(2 *Chal. Opin. Em. Law*, 208.)

Appeals, from the tribunals of the last resort in the colonies to the king in council, seem to have been coeval with the regular organization of the colonial governments. Appeals from the courts of Virginia were taken to the king in council soon after that colony was placed under the government of the king; and before that time they were carried to the treasurer and council of the Virginia company in England, (*Chal. Pol. An.* 38, 41.) At the time of settling the colonies in this country, there was no English judicatory besides those within the realm of England; except those of Guernsey and Jersey, the remnants of the Dutchy of Normandy. According to the custom of Normandy, appeals lay to the duke in council; and upon that ground, appeals lay from the judicatories of those islands to the king of England, as duke in council; and upon that general precedent, without perhaps attending to the fact of the appeal being to the king, in his character of duke of Normandy, it was held, that an appeal should be allowed from the judicatories of the colonies to the king in council, (*Pown. Adm. Colo.* 61, 112.)

But England claimed an absolute supremacy over all her colonies, (*Chal. Pol. An.* 684, 690;) and, for the purpose of sustaining that supremacy, it was finally settled, as an inherent right, as well of the subject to prosecute as of the sovereign to receive appeals, without any reservation of such right in the colonial charters; for, as was said, without such appeal, the law made for, or permitted to a colony might be insensibly changed within itself without the assent of the mother country; and judgments might be given in the colonies to the disadvantage, or the lessening of the supremacy of the mother country, or to make the superiority to be only of the king, not of the crown of England, (*Chal. Pol. An.* 304; *Stokes' View Brit. Col.* 27; 5 *Frank. Works*, 355; *Vaug. Rep.* 290, 402; *Show. P. C.* 33; 1 *P. Will.* 329; 2 *Meriv.* 143.) And as in many cases for the want of a full and accurate knowledge of the peculiar law of the colony it might be difficult or impossible for a party to obtain any benefit by an appeal, without a special verdict, it was thought, that it might be proper to authorize and require the judges in all important cases to compel the jury to find a special verdict. (1 *Chal. Opin. Em. Law*, 185.) Hence with a view to obtain relief by appeal, it appears, that during the provincial government of Maryland, much apparently unnecessary matter, such as acts of Assembly, &c., was introduced into the record in the form of bills of exceptions and special verdicts, (1 *H. & McH.* 67; 2 *H. & McH.* 279.) But it was

ber, 1765. And, on the 19th of the same month, they agreed to and published "a Declaration of the rights and grievances of the

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not easy to induce the colonists to submit to this general supremacy as a fundamental principle in their connexion with the mother country; because it mortified their pride, and was, in all cases in which the right of appeal was exercised, attended with much delay, expense and vexation, (*Chal. Pol. An.* 295, 343, 490, 678; 1 *Ram. U. S.* 111; 1 *Belk. N. Hamp* 247.)

Appeals lay from the highest court of record in each of the colonies to the king in council, in all civil cases, where the land or other thing in controversy amounted to three hundred pounds sterling or upwards in value, (1 *Smith's His. N. York*, 384; *Pown. Adm. Colo.* 61, *note*; 3 *Virg. Stat.* 550; *Stokes' View Brit. Col.* 225; 1 *H. & McH.* 44, 77, 80, 90, 504; 2 *H. & McH.* 324, 346; 1702, *ch.* 1, *s.* 20; 1773, *ch.* 7, *s.* 5 & 6;) and in prosecutions for misdemeanors, where, on conviction, the fine imposed exceeded the value of two hundred pounds sterling, (*Stokes' View Brit. Col.* 224.) But if the matter in question related to the taking, or demanding of any duty payable to the king, or to any fee of office, or annual rent, or the like, where the benefits subsequently accruing from the same title might be bound, or because of the peculiar circumstances of the case, an appeal might, at the discretion of the king in council, be allowed, though the value then immediately involved was less than three hundred pounds sterling. (*Stokes' View Brit. Col.* 224; 2 *Chal. Opin. Em. Law*, 177.) An appeal could only be taken from the colonial court of the last resort; and what court that was depended upon the nature of the case; and upon the constitution of the judicial department of the colony. An appeal lay in some cases from peculiarly constituted tribunals; (1702, *ch.* 1, *s.* 20; 1726, *ch.* 9; 1 *H. & McH.* 409, 509,) or direct from the colonial court of chancery, (*Stokes' View Brit. Col.* 26;) but if the case might have been carried to a higher colonial court, the appeal could only be taken from such court of last resort of the colony, (2 *Chal. Opin. Em. Law*, 175.) In Maryland in a case in the court of chancery upon a petition by the defendant praying an appeal to the king in council, the prayer was on the 1st of March 1738 rejected. "The said prayer, being (as it was said) contrary to his majesty's instructions to grant an appeal to his majesty from any other court, but from the court of appeals which is the supreme court of this province, to which court he may appeal, and from thence to his majesty, if he think fit."—(*Chan. Proc. lib. I. R. No.* 4, *fol.* 60.)

In admiralty cases, if the decision was given by the governor and council, or other colonial court of last resort, then the appeal was direct to the king in council; but if the sentence was passed by a vice-admiralty court, constituted by the king in the colony, then the appeal was to the high court of admiralty of England; and from thence the case might be taken by appeal to the king in council.—(2 *Chal. Opin. Em. Law*, 227, 228.) No case could however be transmitted for difficulty; but must be determined by the court below one way or the other.—(2 *Ld. Raym.* 1448.)

An appeal to the king in council was required to be made within fourteen days after the judgment or decree of the colonial court was rendered; and the appellant was required to give good security to prosecute his appeal with effect, or to pay all costs and damages in case the decision should be affirmed, (1773, *ch.* 7, *s.* 5 & 6; 3 *Virg. Stat.* 550.) The mode of ascertaining the value of the thing in controversy was regulated by the king's instructions; or by the rules of the superior colonial courts. A transcript of the record of the colonial court was made out by its clerk, who made affidavit, that the copy was a true one, and that it had been compared with the original.—(*Stokes' View Brit. Col.* 225.)

When the record thus authenticated reached the king in council, it was almost as a matter of course referred to a committee to consider and report upon the matter.

colonists in America;" in which, among other things, *the late extension of the jurisdiction of the vice-admiralty courts*, was enu-

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Whereupon the committee appointed a time and place for the hearing, of which they gave notice to the parties personally or by publication; after which and upon making up their opinion they reported accordingly. But the course of proceeding before the king in council; the judgment of that tribunal, and its *mandate* with which the case was sent back to the colonial court may be better understood by a perusal of the following extract from the records of the High Court of Chancery of Maryland, in the case of POWLSON *v.* FORWOOD.

"*Memorandum.*—This 22d day of February 1725, his Honour the Chancellor acknowledges to have received of Mr. Plater by order of his Honour the Governor copies of several orders of the king and council, to wit, one of the 11th of August 1720; one other of the 30th of April 1724; and one other of the 4th of July 1724; and ordered the same to be entered in the proceedings of this court to avail so far as they ought; which orders are in the words following, viz:

"At the Council Chamber, Whitehall, the 11th August 1720, present their excellencies the Lords Justices, &c. (Here follow the names of the members of the council.)

"Upon reading this day at the board a report from the Right Honourable the Lords of the committee for hearing appeals and complaints, &c., from the plantations, dated the 4th of this instant in the words following, viz: Whereas by an order in council of the 26th instant referring to this committee the humble petition of *Jonathan Forwood*, complaining of several unjust proceedings against him, and his agents in the courts of judicature in the Province of Maryland at the suit of one *Gilbert Powlson* master of the ship *Dolphin*, touching an agreement entered into between them, for the said *Powlson* to transport from England to the said Province and to Virginia, one hundred and thirty-one servants; on account whereof, the petitioner alleges, the said *Powlson* has obtained two attachments against his effects there, one of them for one hundred and sixty pounds which he actually received, and the other for seven hundred pounds for which he has sold good part of the petitioner's effects in his hands; and humbly praying to be relieved in the premises.

"Their Lordships this day took the same into consideration, and having heard the petitioner by his counsel therein, do agree humbly to report their opinion, that upon *Mr. Forwood's* giving such security as the Governor and Council of Maryland shall think sufficient to answer the said *Powlson's* demands, his goods in specie shall be restored to him, or, in case they are sold, he shall be paid the money arising from the sale thereof; and that thereupon the Provincial Court do proceed to hear and determine the cause or causes with liberty for either party to appeal therefrom.

"Their excellencies the Lords Justices in Council taking the said report into consideration are pleased to approve thereof, and to order as it is hereby ordered, that upon *Mr. Forwood's* giving such security as the Governor and Council of Maryland shall think sufficient to answer the said *Powlson's* demands, his goods in specie shall be restored to him, or in case they are sold he shall be paid the money arising from the sale thereof; and that thereupon the Provincial Court do proceed to hear and determine the cause or causes with liberty for either party to appeal from such determination; whereof the deputy governor, or commander in chief for the time being of the Province of Maryland, and all others whom it may concern are to take notice, and govern themselves accordingly."

"At the court of St. James's, the 30th day of April 1724. Present, the King's most Excellent Majesty, &c. (here follow the names of the members of the council.) Upon reading this day at the board a report from the Lords of the committee for hearing appeals, complaints, &c. from the plantations, &c. (here follows the report

merated as one of their grievances.(*e*) In the year 1767 the British Parliament passed those other acts, for laying *internal taxes* upon the colonists, commonly called *the revenue acts*. Upon these

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of the committee in relation to other matters in the before mentioned case of *Powlson v. Forwood.*)

"His Majesty in council taking the said report into consideration, is pleased to approve thereof, and accordingly to enforce the said order of the 11th of August 1720, and to that end his Majesty is hereby pleased to order, that the Deputy Governor of the said Province of Maryland do command the courts there to carry the said order into immediate execution, by causing speedy restitution to be made the said petitioner of his effects, or, in case they are sold, immediate payment of the money arising therefrom. And his Majesty taking particular notice, that the said Deputy Governor hath not complied with the said former order in council, is hereby further pleased to order and require him forthwith to send an account to this board why the said order was not carried into execution, together with his reasons for the same."

"At the court at Kensington, the 4th day of July 1724. Present, the King's most excellent Majesty, &c. (here follow the names of the members of the council.) Upon reading this day at the board a report from the right honourable the Lords of the committee for hearing appeals from the Plantations dated on the 17th of June last in the words following, viz: (here follows the report in relation to the before mentioned case of *Powlson v. Forwood*, which concludes in these words, *to wit:*)

"Their Lordships having heard counsel on behalf of the appellant, none appearing for the respondent, notwithstanding the usual time for his appearing according to the rules of this board was expired, and although the usual notice was affixed on the exchange of London, do agree humbly to offer it as their opinion to your Majesty, that the said judgments of the 20th of September 1720, and the 7th of May 1723, should be reversed and set aside; and that the appellant be restored to all he hath lost by means of the said judgments."

"His Majesty in council taking the said reports into consideration is pleased to approve thereof, and to order as it is hereby ordered, that the said judgments of the 20th of September 1720, and the 7th of May 1723 be reversed and set aside. And that the appellant be restored to all he hath lost by means of the said judgments whereof the deputy governor or commander in chief for the time being of the said Province of Maryland, and all others whom it may concern are to take notice and govern themselves accordingly."—(*Chan. Proce. lib. I. R. No.* 1, *fol.* 57; 1692, *ch.* 17, *note; Bacon's Laws of Maryland.*)

If the appellant failed to transmit a properly authenticated transcript of the record; or to proceed with his appeal within one year after it had been allowed in the colony, the appeal might be dismissed, (2 *Ld. Raym.* 1447.) No costs were allowed on the final determination of such appeals, or at least not as a matter of course, (4 *Dall. app.* 25; 2 *Ld. Raym.* 1447.) In all cases a decision by the king in council was final and conclusive; and there was no instance of a rehearing of any such appeal, (1 *Ves.* 455.) An opinion seems to have been entertained by some, that the king in council might of himself, and directly, issue an execution; and have a writ of *sequestration* in execution of his final judgment sent to the governor of the colony, (*Gilb. For. Rom.* 215; 2 *P. Will.* 262.) But no coercive process was ever attempted to be issued by the king in council against a colony itself; and if it had been attempted there is every reason to believe, that it would not have been endured. (2 *Hutch. His. Mass.* 204.)

(*e*) 1 Niles's Reg. 13, 65.

acts reaching this country, the Massachusetts Assembly, on the 11th of February 1768, addressed a circular letter to the speakers of the other assemblies, stating the grounds of their opposition to them; that they had forwarded petitions and remonstrances against the late duties; and then say, that "they have also submitted it to consideration, whether any people can be said to enjoy any degree of freedom, if the crown, in addition to its undoubted authority of constituting a governor, should also appoint him such stipend as it shall judge proper, without the consent of the people, and at their expense; and whether, *while the judges of the land*, and other civil officers in the province, hold not their commissions during good behaviour, *their having salaries appointed by the crown, independent of the people, hath not a tendency to subvert the principles of equity, and endanger the happiness and security of the subject.*" This letter, by the express command of the British minister, was by Governor Sharpe of Maryland, in a message of the 20th of June 1768, to the House of Delegates, denounced as a dangerous and factious attempt to disturb the public peace; and the House was requested "to take no notice of it, which would be treating it with the contempt it deserves." In reply to which message, the House, among other things, say, "be pleased to be assured, that we cannot be prevailed on to take no notice of, or *to treat with the least degree of contempt a letter so expressive of duty and loyalty to the sovereign, and so replete with just principles of liberty.*" Immediately upon the receipt of which reply the House of Delegates was prorogued by the governor.(*f*)

The attention of the colonists of this country having been thus, for the first time, solemnly drawn to the nature and importance of *judicial independency*, the subject was universally and thoroughly discussed; and soon became familiarly and perfectly understood. If England had seen, and ascertained the necessity of a *dependent and subservient* judiciary to enforce the *acts of trade*, and the acts for raising an *internal revenue;* the colonies, on the other hand, now saw as clearly, and became as thoroughly convinced, that an *impartial, firm, and independent* judiciary was no less necessary for the preservation of their rights and liberties. It was agreed, on both sides, that laws, whether good or bad, were futile without suitable agents to execute them. In consequence of the opposi-

(*f*) Votes and Proceedings House Delegates, 22d June 1768, and the Council proceedings of the same time. 1 *Pitk. His.* 458, 461.

tion which the colonists made about this time, England withdrew her pretensions for a season, but soon after renewed them in another form.

To oppose this renewed attack another colonial Congress was assembled at Philadelphia, who on the 14th of October, 1774, agreed to and published, "a declaration and vindication of the rights and liberties of the English colonies in North America." This second colonial Congress is universally acknowledged to have been one of the most enlightened, illustrious, and patriotic bodies of men ever convened in any age or nation. Upon the subject of *judicial independency* their language is strong and unequivocal. After enumerating the several acts of Parliament by which the jurisdiction of the colonial tribunals was superseded; and that of the *subservient vice-admiralty*, and other courts substituted in its place, among other causes of complaint, this Congress thus conclude their Declaration of Rights: "To these grievous acts and measures *Americans cannot submit*, but in hopes their fellow subjects in Great Britain will, on a revision of them, restore us to that state in which both countries found happiness and prosperity, we have, for the present, only resolved to pursue the following peaceable measures. 1. To enter into a non-importation, non-consumption, and non-exportation agreement or association. 2. To prepare an address to the people of Great Britain, and a memorial to the inhabitants of British America. And 3. To prepare a loyal address to his majesty; agreeable to resolutions already entered into." In their address to the king, prepared and published in pursuance of this resolution, they complain, among other things, that "the judges of admiralty and vice-admiralty courts are empowered *to receive their salaries and fees from the effects condemned by themselves.*" And, in the same address, they further complain, that "*the judges of courts of common law have been made entirely dependent on one part of the legislature for their salaries, as well as for the duration of their commissions.*"(*g*)

(*g*) The Journals of Congress, 14th October, 1774.

Hastings *v.* Plater.—This bill was filed on the 13th of February 1735, by Samuel Hastings, Samuel Minskie, and John Evitt, against Benjamin Tasker, George Plater, and Onorio Rozolini, executors of Rebecca Calvert deceased, who was administratrix of Charles Calvert deceased. The bill states, that the late Richard Smith, in his lifetime formed a plan for causing a ship to be built by subscription in the city of Annapolis, in which each subscriber was to hold a share in proportion to the sum by him subscribed; that, having obtained from several persons subscriptions to a

This Congress asserted and maintained the rights of their fellow-citizens as Englishmen; and, following the example of "their

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large amount, he employed the plaintiffs to build a ship as proposed, and engaged Patrick Simpson, since deceased, to take charge of her when built as master: that the plaintiffs in compliance with their agreement built and launched a ship, which was called the *Maryland Merchant*, and the greater part of her rigging, tackle, and furniture, were bought and set up in her, and several officers and sailors were hired to navigate her on her intended voyage; but Smith having received all or the greatest part of the subscription money, embezzled so much of it, that he was unable to fit her for sea; that he had not paid these plaintiffs for their work and labour, and had besides involved them and Patrick Simpson in liabilities for several considerable sums of money on account of the ship; that the subscribers and contributors to the building of the ship in this state of things, seeing their prospects of deriving any advantage from their subscriptions to be almost hopeless, and feeling kindly disposed to enable these plaintiffs if practicable to obtain some reimbursement for their losses, transferred and assigned all their interest in her, except some sails paid for on account of D. Dulany, to the value of £120, to these plaintiffs and Patrick Simpson. That afterwards some of the seamen, who had been hired on account of the ship, instituted a suit in the vice-admiralty court of this province before the Honourable Charles Calvert then judge of the said court, against the ship and tackle, &c., and by a decree of that court she was condemned and sold for the sum of £600, which was brought in and deposited with the said judge of the vice-admiralty court; out of which the seamen's wages having been paid there was left a balance of £309; after which Patrick Simpson was paid £102, and William Cummings £6, leaving a residuum of £201; to which these plaintiffs are entitled as assignees of the subscribers. That Charles Calvert the Judge having that money in his hands died intestate, and administration on his estate having been granted to Rebecca Calvert, she thus obtained it; after which she by her last will appointed these defendants her executors and died, and these defendants having taken upon themselves the execution of her will, thus became liable for that amount to these plaintiffs: Whereupon they prayed that the defendants might be compelled to pay them the said sum of money, &c.

On the 17th of February, 1735, the defendant Benjamin Tasker disclaimed any interest in, or any authority to intermeddle with the money mentioned in the complainant's bill, he having before the Commissary General entered on record his renunciation of the executorship of the testament of Rebecca Calvert deceased; and he also disclaimed any right whatever to the administration of the estate of Charles Calvert deceased. The two other defendants by their answer admitted the facts set forth in the bill; but they averred, that the said Charles and Rebecca had made no profit from the money in their hands; that they as well as these defendants had always been and were then ready to pay the same to any persons justly entitled to it, and to whom they could be safe in paying it, &c. The case was thus submitted on bill and answer.

17*th February*, 1736.—Ogle, *Chancellor*.—Decreed, that the defendants George Plater and Onorio Rozolini do pay and deliver unto the complainants the said sum of £201 currency, upon such security being given to the master of this court as he shall judge sufficient by a bond of the penalty of £400 currency, payable to him, with condition to pay and satisfy to any person or persons such proportion of the said £201 as such person or persons shall appear to be justly entitled to after deduction of costs expended in this suit by both parties, which is hereby ordered and directed to be paid out of the said sum of £201 currency.—(*Chan. Proce. lib. I. R. No.* 2, *fol.* 761.)

ancestors in like cases," had recourse to precedent as well as to argument. In the English statute book they found the most unequivocal authority in favour of that *judicial independency*, to the benefits of which, they thus contended the colonists were fully entitled. By the famous English statute, passed in the year 1700, (13 *W.* 3, *c.* 2,) for the better securing the rights and liberties of the subject, it is enacted and declared in these words; "that judges' commissions be made *quamdiu se bene gesserint*, (during their good behaviour,) *and their salaries ascertained and established;* but upon the address of both Houses of Parliament, it may be lawful to remove them."(*h*)

(*h*) The Long Parliament, says the historian of the Commonwealth of England, deserves to be for ever held in grateful remembrance for the great improvements we derive from them in points most essential to the independence and freedom of man in society. Among which is that which relates to the tenure by which the judges, who are appointed to determine questions of law between man and man, and between the sovereign and the subject, hold their offices. One of the earliest decisions of that parliament was the vote condemning the judgment which had been given for the king in the matter of ship money. And shortly after, January 1643, the house of Lords appointed a committee to consider, among other things, of the judges holding their places *durante bene placito*. The next day they deputed seventeen of their body to present their humble desire to the king, that the twelve judges, and the attorney of the court of wards, might hold their places by patent, *quamdiu se bene gesserint*. They accordingly waited on Charles with their request; to which he signified his assent. Agreeably to this decision, in the petition of both houses of parliament presented to the king at Oxford, at the close of the first campaign of the civil war, they make it one of their demands, that the twelve persons whom they name for the office of judges, as well as all the judges of the same courts for the time to come, should hold their places by letters patent *quamdiu se bene gesserint*.—(*Godw. Com. Eng. b.* 3, *c.* 29.)

Immediately after the king had been put to death it was enacted by the Long Parliament, that the commissioners of the great seal should also hold their offices during good behaviour, (3 *Godw. Com. Eng.* 11.) But this important improvement as to the tenure by which the judges and chancellor were to hold their offices, was, on the restoration of Charles the second, entirely put aside, and nothing more said upon the subject until some time after the English revolution of 1688, when it was enacted by the statute of the 12 & 13 *W.* 3, *c.* 2, that the judges should hold their commissions during good behaviour; still however leaving the Chancellor to hold, as formerly, during pleasure.

In an opinion of the attorney and solicitor general D. Ryder, and W. Murray, given on the 22d of June 1753, to the commissioners of trade and plantations respecting an act passed by the General Assembly of Jamaica, providing, that all the judges of the supreme court of judicature of the island should hold their offices *quamdiu se bene gesserint*, they say, that "it directly affects the royal prerogative, in a point of great moment, and for which no occasion is pretended to be given, by the abuse of any power committed to the governor; or, if there had been any, it would be much more suitable to his majesty's honour and dignity, to reform it, by his own authority, fully sufficient for that purpose, in such manner, as to his royal wisdom should seem meet, than by the interposition of an act of Assembly; nor does it appear to

Not quite two years after the meeting of the second Colonial Congress, the United States declared themselves independent; and, in their Declaration of Independence, among the wrongs they charge upon the British king, and as one of "the causes which impelled them to the separation," it is alleged, that "he has made judges dependent on his will alone, for the tenure of their offices, *and the amount and payment of their salaries.*"

After all these ample discussions and close investigations of the rights of the people, and after the publication of all these solemn acts, the convention of Maryland was convened, in the month of August, 1776, to establish a form of government for the State. The great field of politics had been fearlessly and diligently

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us, that in the situation, and circumstances, in which this island, or the other American plantations, stand, it would be advisable, either for the interests of the plantations themselves, or of Great Britain, that the judges in the former should hold their places *quamdiu se bene gesserint.*"—(2 *Chal. Opin. Em. Law*, 105.)

"The next general point yet undetermined, (said Governor Pownall in 1768 in speaking of the colonial governments,) the determination of which very essentially imports the subordination and dependence of the colony governments on the government of the mother country, is, the manner of providing for the support of government, and for all the executive officers of the crown. The freedom and right efficiency of the constitution require, that the executive and *judicial* officers of government should be *independent of the legislative ;* and more especially in popular governments, where the legislature itself is so much influenced by the humours and passions of the people; for if they do not, there will be neither justice nor equity in any of the courts of law, nor any efficient execution of the laws and orders of government in the magistracy; according, therefore, to the constitution of Great Britain, the crown has the appointment and payment of the several executive and judicial officers, and the legislature settles a permanent and fixed appointment for the support of government and the civil list in general. The crown therefore has, *a fortiori*, a right to require of the colonies, to whom, by its commission or charter, it gives the power of government, such permanent support appropriated to the offices, not the officers of government, that they may not depend upon the temporary and arbitrary will of the legislature."

And again he says, "the point then of this very important question comes to this issue, whether the inconveniences arising, and experienced by some instances of misapplications of appropriations, are a sufficient reason and ground for establishing a measure so directly contrary to the British constitution: and whether the inconveniences to be traced in the history of the colonies, through the votes and journals of their legislatures, in which the support of governors, judges, and officers of the crown will be found to have been withheld or reduced on occasions, where the assemblies have supposed that they have had reason to disapprove the nomination,—or the person, or his conduct;—whether, I say, these inconveniences have not been more detrimental, and injurious to government; and whether, instead of these colonies being dependent on, and governed under, the officers of the crown, the sceptre is not reversed, and the officers of the crown dependent on and governed by the Assemblies, as the colonists themselves allow, that this measure renders the governor and all other servants of the crown dependent on the Assembly."—(*Pown. Adm. Colo.* 76, 78; *Smith's His. N. York*, 118; 1 *Pitk. His.* 126; 7 *Mass. His. Soci.* 129.)

explored in every direction; and the soundest and most approved political axioms were laid before that convention. It appears, that none of those principles and solemn acts, in which their fellow-citizens had taken a deep interest, were overlooked, or suffered to escape their attention—of which the following comparison will afford one, among the many proofs, that might be adduced.

In the Colonial Declaration of Rights of the 14th October, 1774, among other things, it was declared, "that the *respective* colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law. That they are entitled to the benefit of such of the English statutes as existed at the time of their colonization; and which they have, by experience, *respectively* found to be applicable to their several local and other circumstances." By the third article of the Declaration of Rights of this State, it is declared, "that the inhabitants of Maryland are entitled to the common law of England, and the trial by jury, according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which by experience have been found applicable to their local and other circumstances."

This coincidence, of sense and language, could not have been merely accidental; it therefore proves, that those several antecedent declarations of the rights, and of the independence of the people of this country, were the sources whence many of the provisions of the Maryland Declaration of Rights were almost literally taken; that the complaints of the grievances, arising from *a dependent and subservient judiciary*, as expressed in the previous Declarations of 1765, of 1774, and of 1776, were then actually before the Maryland convention; and, that the *judicial independency*, spoken of in our constitution, was intended to be analogous to, but more perfect, than that specified in the English statute of 1700, which had become so well understood, and was so solemnly and generally approved. In a word, it is manifest, from all the public acts, discussions, and circumstances of those times, that the *thirtieth* article of our Declaration of Rights must be regarded as the condensed expression of those opinions and principles, relative to *judicial independency*, to establish and sustain which all united America fought, bled, and triumphed.

Such is the history of this provision of our Declaration of Rights, relative to *judicial independency*. Let us now attentively consider

the article itself; first as relates to its general character, and then analyze and investigate its several parts. The article is in these words:

"That the independency and uprightness of judges are essential to the impartial administration of justice, and a great security to the rights and liberties of the people; wherefore, the chancellor and all judges ought to hold commissions during good behaviour: and the said chancellor and judges shall be removed for misbehaviour, on conviction in a court of law, and may be removed by the governor, upon the address of the General Assembly: provided, that two-thirds of all the members of each house concur in such address. That salaries, liberal, but not profuse, ought to be secured to the chancellor and the judges, during the continuance of their commissions, in such manner, and at such time as the legislature shall hereafter direct, upon consideration of the circumstances of this State. No chancellor or judge ought to hold any other office, civil or military, or receive fees or perquisites of any kind."

The objects contemplated by this article are the personal qualifications of an individual. It looks altogether to man as a moral agent; and proposes to sustain and fortify those excellencies and capacities which fit him to be entrusted with judicial power; and to provide against those passions and frailties which may occasion an abuse of such power. This general character of this article will be more distinctly understood by contrasting it with some other provisions of the constitution, which speak of collective bodies, of divisions, and of departments of power.

Thus, it is declared, "that the legislative, executive, and judicial powers of government, ought to be for ever separate and distinct from each other." In this there is no reference to personal and moral qualities; it speaks merely of the artificial political divisions of power; and directs each one of them to confine itself within its own proper sphere. Again, it is said, "that no aid, charge, tax, burthen, fee or fees ought to be set, rated, or levied under any pretence, without the consent of the legislature;(*i*) that

(*i*) This peculiar expression in the twelfth article of the Declaration of Rights, refers to that controversy which originated in the year 1770, between the Proprietary Governor Eden, and the House of Delegates, as to the power claimed by the Governor and Council to settle the rate of officers' fees by proclamation without the consent of the people through their Delegates. This claim of the last provincial governor was strikingly analogous to that set up by the mother country to levy taxes by act of parliament without the consent of the representatives of the colonists. It

no law to attaint particular persons of treason or felony ought to be made in any case, or at any time hereafter; that excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted by the courts of law." These restrictions relate to the executive, legislative, and judicial powers respectively; they refer to masses of power, or modes of authority; and declare, that they shall be restricted to a certain extent, and confined within certain boundaries.

This *thirtieth* article does not speak of the quantity, quality, or extent of judicial, or any other sort of power; laying aside every thought upon those subjects, it gives us to understand, that be the extent and nature of the judicial power what it may, it is of vital importance to have suitable agents to execute it. This article contemplates the moral and intellectual qualities of the man who is the public agent. "The independency and uprightness of judges;" that is, the firmness, the honesty, the skill, and the resolution with which the men appointed to fill judicial stations, will resist all threats, temptations, and undue influence. It is these personal and moral qualities which "are essential to the impartial administration of justice, and a great security to the rights and liberties of the people." To sustain these qualities, and to prevent a deviation from these moral principles, is the sole object of this article; and is that which gives to it its peculiar features and character.

After having thus distinctly indicated the human excellencies which are required for judicial stations, this article then proceeds to prescribe the *mode* in which those excellencies shall be sustained. It directs the manner in which deviations from them may be corrected and punished; and then concludes by removing from about the judicial office one class of the temptations by which it had been previously beset. That is, the judge is to be supported in the firm, independent, and impartial discharge of his official duty, by being commissioned during good behaviour; and also by having his salary secured to him during the continuance of that commission; he is to be punished for misbehaviour by removal; and he is not, as formerly, to be exposed to the temptation to go

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is to this claim of settling the fees by proclamation, that the first legislative enactment of the republic upon the subject of fees alludes by declaring, that officers' fees can be rated, regulated and established by act of Assembly only.—(*October* 1777, *ch.* 10; *Biog. Sign. D. Inde. Life of Carroll.*)

astray by being allowed to receive fees or perquisites of any kind.(*j*)

(*j*) It is said, that during the rude ages of all nations those intrusted with the administration of justice were compensated for their trouble by fees and perquisites paid by the suitors, (*Smith's Wea. Nat. b.* 5, *c.* 1, *pt.* 2.) This mode of remunerating the judges for their services still continues to a great extent in England, although they have for a long time past had certain salaries allowed them by act of parliament.

But all exactions or fees paid by the suitor, in whatever form they may be imposed, are, in truth, taxes; and taxes of the most unequal and unjust kind. Dr. Franklin in his examination before the House of Commons in 1766, in answer to the question, Is the American stamp act an equal tax on the country? said, he thought not, because the greatest part of the money must arise from lawsuits for the recovery of debts, and be paid by the lower sort of people, who were too poor easily to pay their debts. It is therefore a heavy tax on the poor and a tax upon them for being poor. And further, that such a tax would not be a means of lessening the number of lawsuits; because as the costs all fall upon the debtor, and are to be paid by him, they would be no discouragement to the creditor to bring his action, (4 *Frank. Wor.* 128; *Smith's Wea. Nat. b.* 5, *c.* 2, *app. to art.* 1 & 2.)

The Congress of 1774 in their address to the king, among other things, complain, that the judges of admiralty and vice-admiralty were empowered to receive their salaries and fees from the effects condemned by themselves, (*Jour. Cong. 26th October*, 1774.) The ground of this complaint was not merely, that those judges were permitted to take fees from suitors, for that was then allowed to almost all the judges of the colonies; but that those fees, being taken from the property condemned by themselves, gave an undue bias to their minds, and the authority to take them operated as a continual temptation to condemn where there was no sufficient cause.

Under the Provincial Government of Maryland a great variety of fees were allowed and directed to be paid to the chancellor, which must have formed a very considerable portion of the annual emoluments of his office.—(1715, *ch.* 25, *s.* 2; 1763, *ch.* 18, *s.* 88.)

After the Declaration of Independence, the General Assembly recite, that "whereas it is inconsistent with the Declaration of Rights, that the chancellor or judge of the admiralty should take fees or perquisites of any kind; and it is apprehended, that private individuals who have business done for them in the chancery court or court of admiralty, or who may have the great seal affixed to any patent commission, or other paper, for their benefit, should pay for the same;" and then enact, that certain fees in chancery, and for the great seal, should be paid, and that the register should every half year pay the same to the treasurer for the use of the public.—(*October* 1777, *ch.* 13; *November* 1779, *ch.* 25, *s.* 22.)

It is remarkable, that the fees collected under this law should always have been accounted for as so much money arising from *seals and taxes;* that fees thus levied should have been at all times regarded by the English authorities as *taxes* which formed a part of the public revenue, (*Smith's Wea. Nat. b.* 5, *c.* 1, *pt.* 2; *Warrington v. Mosely*, 4 *Mod.* 320;) that the people of Maryland in their then late controversy with Governor Eden, respecting his claim of settling these same kind of fees by proclamation, should have insisted, that they could be considered in no other light than as *taxes;* and yet, that in the passage of this law, directing them to be collected and paid into the treasury for no avowed or conceivable *political purpose*, it should not have occurred to them, that this partial mode of taxation was in direct violation of that article of the Declaration of Rights which declares, "that the levying taxes by the poll is grievous and oppressive, and ought to be abolished; that paupers ought

But, upon the present occasion, it is that portion of the provisions of this article, relating to judicial *salaries*, which alone claims

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not to be assessed for the support of government; but every other person in the State ought to contribute his *proportion* of public taxes, for the support of government, according to his actual worth, in real or personal property within the State; yet fines, duties, or taxes may properly and justly be imposed or laid, *with a political view*, for the good government and benefit of the community."—(*Sloane v. Pawlett*, 8 *Mod.* 18; *Vattel*, *b.* 2, *s.* 240, 252.)

Under the clause, which declares, that no Chancellor or Judge ought to receive fees or perquisites of any kind, it is evident, that at least as regards them, justice must be administered *gratis*, however much or improperly it may be otherwise encumbered with costs and expenses. But, as has been said, it was not so much to diminish the expense, as to prevent the corruption of justice, that the judges were prohibited from receiving any present, or fee from the parties. For, upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary, that the judicial should be separated from the executive power; but that it should be rendered as much as possible independent of that power. The judge should not be liable to be removed from his office according to the caprice of that power. The regular payment of his salary should not depend upon the good will, or even upon the good economy of that power.—(*Smith's Wea. Nat. b.* 5, *c.* 1, *pt.* 2.)

It seems to be a generally received opinion, that the Chancellor and Judges have, each of them, an estate, or a vested interest in their respective salaries, (*Whittington v. Polk*. 1 *H. & J.* 236; *Coop. Just.* 599.) This estate in a judicial salary is, however, one of a very peculiar character; it is not subject, before it becomes due, to be disposed of at the pleasure of the holder. It is like a limited and qualified estate in an annuity. As where an annuity charged upon land was granted by Oliver to Emsonne, in consideration of his, Emsonne's, giving his counsel to Oliver; it was held, that the trust and confidence which Oliver reposed in Emsonne for his advice, being incidental to the cause for which the annuity was granted it could not be assigned to another or forfeited. (*Oliver v. Emsonne, Dyer*, 1 *b.*; 1 *H. Blac.* 627, *note*; *Maund's Case*, 7 *Co.* 112; *Co. Litt.* 144 *b. note* 1.) So that looking to the peculiar cause of the grant it appears, that even in the case of an annuity granted by one person to another, the grantee may have vested in him nothing more than an inalienable and qualified estate.

But in deciding upon the nature of a *public* grant, the great object of public policy in making the grant must be attended to. The general intent pervades the whole; and each yearly payment of the salary must be subject to it. The public has a deep interest in the due and appropriate application of judicial salaries as well as in their regular continuance and payment; because they are given for services rendered to the State of the most precious nature, by a class of the most important "trustees of the public." Such salaries are granted to support the dignity of the State, and the administration of justice; and therefore no judicial salary can be sold, assigned, mortgaged, or transferred, either by the act of the party, or by operation of law as in cases of insolvency; because the public policy by which any such voluntary or involuntary alienation is prohibited is incidental to the cause for which it is granted; and cannot be separated from it. One of the special objects in giving such a salary is to enable the judge continually, and at all times to discharge his duties to the public without interruption from any pecuniary embarrassment; for, although mere insolvency cannot be considered, in all cases even as a deviation from duty, much less a crime; yet

our special attention. It is declared, "that salaries *liberal but not profuse ought* to be secured to the chancellor and the judges." The authors of this article were perfectly well acquainted with the condition of this country under the colonial monarchy. The Declaration of Independence had proclaimed, that "he (the British king,) has erected a multitude of new offices, and sent hither swarms of officers to harass our people, and eat out their substance." And when the authors of this article meditated on the subject of judicial salaries, the picture of the past oppressive prodigality, and a cheering hope for the future were before them; the contrast pressed upon their minds, and their thoughts, thus influenced, were happily expressed in the four words, "*liberal but not profuse.*" But this expression gives no positive direction. It merely indicates an opinion, that the future judicial officers of the State should be compensated according to the just and *liberal* principles of the republic; not in the *profuse* manner in which they had been maintained under the late monarchy, and nothing more. It lays down no positive rule, and therefore gives no command.(*k*)

The salaries, it is said "*ought* to be secured." It will be sufficient to observe here, that the word "*ought*" frequently occurs in

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if a judge, because of his insolvency, be restrained from performing the labours assigned to him, such a failure of duty may be deemed a misbehaviour in office within the meaning of the Constitution. (*Griesley's Case*, 8 *Co.* 82; *Crouch v. Martin*, 2 *Vern.* 595; *Milhwold v. Waldbank*, 2 *Ves.* 238; *Flarty v. Odlum*, 3 *T. R.* 681; *Ledderdale v. Montrose*, 4 *T. R.* 248; *Barwick v. Reade*, 1 *H. Blac.* 627; *Arbuckle v. Cowtan*, 3 *Bos. & Pul.* 322; *Stone v. Ledderdale*, 2 *Antr.* 533; *Monys v. Leake*, 8 *T. R.* 411; *Ex parte Parnell*, 1 *Swan.* 436; *Pow. Mort.* 80, *note C.*; 1814, *ch.* 113, *s.* 4; *Act Cong.* 18*th March*, 1818, *ch.* 18, *s.* 4; *Lowe v. Moore*, 1 *McCord*, 243.)

(*k*) "Judges (it is said by a sensible Reviewer,) should be placed above pecuniary difficulties; their minds should not be diverted from their important duties, by the pinching of want, or the necessity of devising ways and means to eke out a living for their families. Such a situation both lessens respectability and invites temptation. Bring the administrators of the law, through whose sanctions alone the sovereignty of the people is heard, into contempt, and the law itself will soon become odious—render the law and its tribunals odious, and you prepare the people to despise the yoke and to embrace any change which would afford a prospect of relief. Let it be borne in mind by those in whose hands are our destinies, our legislators, that the most distinguishing and delightful characteristic of our people, is their cheerful submission to the law: to that they universally bow down with obedience, and upon that foundation, mainly, stand our republican institutions. Every thing which tends to shake it, a patriot should deprecate; and we know nothing more surely calculated to produce that lamentable effect, than the reduction of the salaries of the judges to a bare subsistence, by which these offices will ere long be thrown into the hands of inferior men, or will render those of a superior character who imprudently accept them, the victims for life of debasing want."—(3 *Southern Review*, 446.)

this Declaration of Rights, and is always used in the imperative sense of the word, "*shall*." Thus, it is said, "that no soldier *ought* to be quartered in any house," &c. "that no person *ought* to hold at the same time more than one office," &c. The manifest and settled meaning of which is, "that no soldier *shall*," &c.; "that no person *shall*," &c. Such also is the meaning of the word "*ought*" in the article under consideration; the clear sense of it is, that the salaries "*shall* be secured," &c.

It is said, that the salary *shall* "be *secured* to the chancellor;" that is, according to the universally received meaning of the word "*secured*," the salary shall be "ascertained, made certain, put out of hazard, protected, made safe, and insured," to the chancellor. And even yet more; it is said, that salaries shall be *secured* to the chancellor and judges "*during the continuance of their commissions*." Thus, after expressing an opinion, that the salary should be *just in amount*, and declaring, that it *shall be secured*, the *term and duration* of that security is distinctly specified, in a manner which it is utterly impossible to pervert, or to misunderstand. The English statute of the year 1700, as we have seen, had declared, that the judges' salaries should be "*ascertained and established*." Had this article said nothing more than, that the salary should be "*secured*," it might have been considered as ambiguous; and there might have been found some grounds on which plausibly to contend, that the salary was sufficiently "*secured*," if it were fixed by the legislature from one term of years to another, or from year to year. But all such obscurity has been completely removed by this distinct specification of the *duration* of the security intended. The security and certainty of the salary is to be co-extensive with that of the commission; or, in the words of the article, which cannot be made plainer, the salary is to be secured to the chancellor "*during the continuance of his commission*." Let us proceed again with our commentary.(*l*)

(*l*) In England there are two modes of constituting a chancellor, either by letters patent, which is rarely used, or by delivery of the great seal, which delivery is to be entered upon record. But it must be recollected, that if the great seal be delivered by the king, although the person to whom it is so delivered is thereby constituted Chancellor, yet he cannot alone seal writs therewith, or at all; except in the presence of some of the masters in chancery, until he has regularly taken the oaths of office. And it is said, that it is not inconsistent for the Lord Chancellor also to hold at the same time the office of Chief Justice of the King's Bench.—(1 *Harr. Pra. Chan.* 68; 1 *Newl. Chan.* 1; 4 *Inst.* 87; 3 *Blac. Com. by Chitty*, 47.)

"In all the king's governments so called, (of the colonies, said Governor Pownal

A salary, just in amount, shall be secured to the Chancellor during the continuance of his commission, it is said, "in such

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in 1768,) the governor, or the governor and council are the chancellor, or judges of the court of chancery. But so long as I understand that the governor is, by his general instruction, upon sound principles of policy and justice, restrained from exercising the office of judge or justice in his own person, I own I always considered the governor, taking up the office of chancellor, as a case labouring with inexplicable difficulties. How unfit are governors in general for this high office of law; and how improper is it that governors should be judges, where perhaps the consequence of the judgment may involve government, and the administration thereof, in the contentions of parties. Indeed the fact is, that the general diffidence of the wisdom of this court thus constituted, the apprehension that reasons of government may mix in with the grounds of the judgment, has had an effect that the coming to this court is avoided as much as possible, so that it is almost in disuse, even where the establishment of it is allowed. But in the charter governments, (New England and Pennsylvania,) they have no chancery at all." "This introduced a practice, (in New England,) of petitioning the legislative courts for relief, and prompted those courts to interpose their authority. These petitions becoming numerous, in order to give the greater despatch to such business, the legislative courts transacted such business by orders or resolves, without the solemnity of passing acts for such purposes; and have further extended this power by resolves and orders, beyond what a court of chancery ever attempted to decree, even to the suspending of public laws, which orders or resolves are not sent home for the royal assent."—(*Pown. Adm. Colo.* 110; *See Constitution of New Jersey, art.* 8.)

Upon a complaint made, on the 6th of November 1735 to the General Assembly of New York, they, among other things, resolved, "that a court of chancery, in this province, in the hands or under the exercise of a governor, without consent in General Assembly, is contrary to law, unwarrantable, and of dangerous consequence to the liberties and properties of the people."—(1 *Smith's His. N. York*, 386.)

Under the proprietary government of Maryland the chancellor of the province was sometimes constituted by a formal commission from the Lord Proprietary; (*Chan. Proc. lib. P. L. fol.* 488, 717.) but most usually, as it would seem, by a delivery of the great seal by the Lord Proprietary in person, or by, or in the presence of the council. The governor for the time being was, in several instances, by the same commission also constituted chancellor and keeper of the great seal of the Province. The first provincial governor, by his commission bearing date on the 15th of April 1637, was constituted governor, lieutenant general, chief captain, and commander, as well by sea as by land, and also *chancellor*, chief justice, and chief magistrate within the province, (1 *Boz. His. Mary.* 291.) A similar commission was granted by the Lord Proprietary on the 18th of September 1644. (*Land Records, lib.* 1, *folio* 195.)

But although for some time after the settlement of the country, the governor was invested with a variety of military and civil offices, yet he was not permitted to act of himself in all respects and alone in any one of them. As governor there were few powers which he could exercise without the advice and consent of the council who were placed about him; and as chancellor he could do no act but as a court sitting with his assistants. (1 *H. & McH.* 6 & 165; 4 *H. & McH.* 477.) In a petition in the case of Nicholas Painter and wife against Samuel Lane in chancery addressed to the Lord Proprietary in June 1681 it is said, "that the court of chancery is and ought to be always open as to the proceedings therein; but your lordship

manner, and at such time as the legislature shall hereafter direct, upon consideration of all the circumstances of the State." Thus,

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having not yet empowered your chancellor or chief justice of your said court to answer petitions or make orders touching the proceedings, as is used in England, without a full court of four at the least; your petitioners are therefore necessitated to apply themselves to your lordship and humbly pray, that your lordship would please to order that the defendant may put in his answer by a certain day," &c. Which was accordingly ordered by the lord proprietary himself. (*Chan. Proc. lib. C. D. fol.* 306.) But it appears, that William Holland was by a commission from the lord proprietary, under his great seal at arms, bearing date on the 27th of February 1719, attested by his governor, constituted chancellor of the province, with full power to do, perform, hear and determine all such matters and things as to the office of chancellor of right belonged or appertained. After which the chancellor of Maryland always sat as sole judge, without assistants; and his court was thenceforward in all respects as accessible for all persons as the chancery court of England.—(*Chan. Proc. lib. P. L. fol.* 488, 717.)

During the short time that the government of the province was taken immediately into the hands of the king, it does not appear how the chancellor was appointed. Although it seems to have been most usual to constitute the same person both governor and chancellor, as in the case of John Hart who was governor and chancellor, (*Chan. Proc. lib. P. L. fol.* 74, &c.) yet it was not always done, for it appears, that different persons were sometimes appointed to fill each office, (1697, *ch.* 6, *s.* 6,) but however that might have been, it is certain, that the two offices were always considered as being entirely separate and distinct in their nature.

It appears, that Robert Eden, the last provincial governor of Maryland, (who was brother-in-law of the then Lord Baltimore, and a lieutenant in the Coldstream regiment of guards,) was commissioned as governor, with the approbation of the king, (as was required by the statute of 7 & 8 *W.* 3, *c.* 22, *s.* 16,) by the lord proprietary; which commission he produced to the provincial council who thereupon administered to him the oaths appointed to be taken by the governor. Immediately after which his predecessor, Horatio Sharpe, delivered to him the great seal of the province, whereupon the oath of chancellor was administered to him, Eden, by the members of the council then present; all of which was entered of record in the book of the council proceedings.—(*Coun. Pro. lib. N. folio* 32, 45, 47.)

By the Declaration of Rights it is declared, that the *chancellor* and judges ought to hold *commissions* during good behaviour; and the Constitution also declares, that they shall hold their *commissions* during good behaviour; that the governor for the time being, with the advice and consent of the council, may *appoint* the chancellor and all judges; that the council shall have power to make the great seal of this State, *which shall be kept by the chancellor*, for the time being, and *affixed to all laws, commissions*, grants and other public testimonials as has been *heretofore practised* in this State; that every bill passed by the General Assembly, when engrossed, shall be presented by the speaker of the House of Delegates in the Senate to the governor for the time being, *who* shall sign the same and thereto *affix the great seal*, in the presence of the members of both houses; and that all *public commissions* and grants run thus: "The State of Maryland," &c. and shall be signed by the governor, and *attested by the chancellor with the seal of the State annexed*, except military and militia commissions, which shall not be attested by the chancellor, or have the seal of the State annexed.

Some of these constitutional provisions are apparently incompatible with each other. It is declared, that the great seal shall be *kept* by the chancellor; and also,

after having conveyed an adequate idea of what should be the *amount* of the salary; and having imperatively directed that it *shall* be provided; and when provided, that it shall be *secured;* and then, to remove all ambiguity, having designated the *duration* of that security; it would seem, that nothing was left for implication; and consequently, that nothing further was necessary to be said upon the subject. But, had the clause stopped at that point, it might have been asked, In what manner shall provision be made for the payment of this salary? Under the government just then abolished, judicial salaries were provided for in various ways. Sometimes "in such manner and at such time" as the lord proprietary; as the king; as the parliament; as the colonial legislature; or as one of the branches of the colonial legislature thought proper to direct; and that too, in most instances, without the least "consideration of the circumstances of the State."

But, this last provision has removed even this doubt, by expressly investing the legislature with the power to create, or to set apart any particular fund, and to make *appropriations*, in such manner as

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that *the governor shall affix it* to all engrossed bills, &c.; consequently, during the time that the governor has the great seal in his possession, for that purpose, it cannot be said to be *kept* by the chancellor. The chancellor is, therefore, the keeper of the great seal at all times, and for all purposes; except for that particular occasion of affixing it to engrossed bills when it is taken possession of and kept by the governor. (*Dr. Bonham's Case*, 8 *Co.* 234.) It is however declared, that all *public commissions* shall be signed by the governor, and attested by the chancellor with the seal of the State annexed. But it is obvious, that the chancellor himself can have no such commission, since it would be absurd to direct, that a commission should be made to him signed by the governor, and attested by *himself* with the great seal annexed of which he *himself* is declared to be the keeper. And although it is also declared, that the great seal shall be affixed to all commissions *as heretofore practised;* and it may have been the practice, in some cases, to constitute the provincial chancellor by *commission;* yet it was a commission, not under the great seal of the province, but under the lord proprietary's "hand and greater seal at arms," like that of the commission to the governor.—(*Com. Pro. lib. N. folio* 45.)

The chancellor of Maryland, therefore, cannot, according to the provisions of the form of government of the State, be constituted by letters patent or a public commission in like manner as the other judicial officers of the State are constituted. But, when the office of chancellor becomes vacant, the great seal is taken into custody and kept by the governor; and when a person is appointed to fill the vacant office, he is constituted chancellor by having his appointment recorded in the council proceedings, (*Const. art.* 26;) and by having the prescribed oaths of office administered to him, by the governor, at the time of delivering to him the great seal of the State, (*February* 1777, *ch.* 5, *s.* 2; *Votes & Pro. H. Del.* 14*th March*, 1777.) The chancellor's holding of a *commission*, therefore, must necessarily consist merely in the holding of the great seal under the authority of his appointment as recorded in the council proceedings; and thus, in this respect, and in point of form at least, it differs from all other commissions spoken of in the Constitution.

they may think proper, for the payment of this peculiarly and clearly defined salary of a chancellor or a judge. But, the *amount* of the salary being once designated by the General Assembly, whether by law, resolution, or in any other legislative way, that *amount*, so designated, is, by this article of the Declaration of Rights, secured during the continuance of the commission; and nothing remains at the discretion of the legislature but the mode of making provision for its payment.

If the correctness and utility of provisions, such as these, concerning judicial salaries, could be supposed to stand in need of any testimonials in their favour from actual practice; or, if their perspicuity could be made more clear by illustrative examples, the immediately antecedent occurrences in our own country would furnish the most ample exposition of their bearing and tendency; and the most unanswerable proofs of their utility and value. The colonial Congress of 1774, that most illustrious body of men, deliberately and solemnly declared to their then king, that in the colonial courts of admiralty justice had been perverted, *because* the judges were "empowered to receive their salaries and fees from the effects condemned by themselves;" and they further declared, that the administration of justice, in the colonial courts of common law, was no less partial and impure, *because* the judges of those courts had been "*made entirely dependent on one part of the legislature for their salaries*, as well as for the duration of their commissions." And, among the causes which impelled us to the separation from the mother country, it is charged, that the king had made the judges dependent on his will alone for "*the amount and payment of their salaries.*"

These are some of the great lessons of our revolution. They were among the axioms deemed unquestionable in those times. It had been sorely and deeply impressed upon the minds of all the people of America, that a *dependent* judge was the fit instrument of an oppressor; that an *independent* judge was a proper and necessary guardian of a freeman's rights; that judges, like other men, were frail, and always found to be entirely subservient to those on whom they were dependent for their salaries, and their bread; and that wise and salutary laws were a mockery, without *firm* and *impartial* judges to administer them.

Having thus traced the origin, history, and nature of the security of judicial salaries; and having carefully considered that article of the Declaration of Rights in which their security is particularly

provided for, declared, and defined; as well according to its general character, as the meaning of each phrase and sentence; let us now inquire what has been the operation of those constitutional provisions, and the actual practice under them, from the time the government of the Republic was organized, down unto the twenty-sixth day of February last, when the unhappy deviation complained of took effect.

It should be recollected, that soon after the commencement of our revolutionary struggle, the proprietary government of Maryland ceased to exist; and, during a period of about two years, was succeeded by a government made up of mere voluntary associations; of district and county committees, arranged, by common consent, under the superintendence of a General Convention and a Council of Safety. That by the direction of one of those conventions, a new convention was elected and assembled in August, 1776, "for the express purpose of forming a new government by the authority of the people only," who, in the name of the people drew up and adopted, "the Declaration of Rights, and the Constitution and form of Government of the State of Maryland." The manner in which this new government was organized, and when, and how its principles began to operate, should also be recollected.

The General Assembly, to be called together under the new constitution, and which met, for the first time, on the 5th day of February, 1777, was charged with the creation, and establishment of the executive, and judicial departments. The governor and council were elected on the 14th February, 1777, but did not qualify until the 20th of March following. After which, the Council of Safety, which had exercised both executive and judicial functions in cooperation with the General Assembly, was dissolved; and, all its authority, except the power of banishment, was lodged with the newly formed executive. The Chancellor, the Judges of the General Court; and of the Admiralty Court; the Justices of the Peace, who formed the County Courts; and the Attorney General, were appointed by the legislature on the 3d of April 1777. An act was passed declaring, that the courts of justice should be opened on the first of July in the same year; but the Court of Chancery was not, in all respects, accessible to suitors until some time after. It was determined, at this first session of the Assembly, that the Court of Appeals should be constituted of *five* distinct judges, who, owing to the circumstances of the State, were not appointed by the legislature until the 12th of December,

1778; but the act authorizing them to appoint their clerk did not pass until the 5th of May, 1780. Hence it was not until after that period, that the judicial department could be said to be completely, and in all its branches, prepared and ready for the administration of justice.(*m*)

But, this government was framed during the heat of a most distressing and perilous war; when the movements of the best established political institutions might have been interrupted by the rude collisions of the times. It could not, therefore, be supposed, that every principle of the newly written constitution was, at once, fully to operate; and, that all its provisions were to be, from the very outset, exactly observed. Maryland, never having been the immediate seat of war, during our revolutionary conflict, had not felt any of those dreadful calamities, that are always exhibited on such a theatre. But, the people were exposed to frequent predatory incursions; and, in other respects, had their full share of burthens and sufferings.

After the disastrous battle of Camden, when the enemy, flushed with victory, began his march towards this State, all its energies were aroused, and all its resources called forth to meet and repel the approaching danger. The government was put into a condition to disperse, to fly, and to reassemble in a place of safety. The payment of all drafts upon the treasury was prohibited, that the public finances might be husbanded for the occasion. It was resolved, that a request be sent to the general court to adjourn; the expected interruptions of the usual and periodical movements of judicial proceedings were provided against; and the executive was armed, for the season, with a vigour far beyond the temperate restrictions of the newly adopted constitution. But, fortunately, this awfully threatening cloud broke before it reached us; and we suffered nothing from the bursting of that storm, the terrifying advances of which, had stimulated every nerve in the State. The capture of the British army at Yorktown relieved our apprehensions, without, however, allowing any immediate relaxation of our efforts. Better times were approaching, but their tardy development was accompanied with such alternations of hope, doubt, and fear, as to forbid those retrenchments, which would certainly have

(*m*) For what is stated in this paragraph, see the Votes and Proceedings of the two Houses of the General Assembly; and the acts of February 1777, *ch.* 8 & 15; October 1777, *ch.* 19, and March 1780, *ch.* 23.

been made on a strong assurance of peace. The signature of the preliminary treaty of peace was not formally announced to the legislature until the 8th day of May, 1783.(*n*)

The independence and freedom of Maryland were thus finally recognized and established; but the State was left in debt, and in poverty. We commenced a new era, with a new set of political institutions, founded on principles original in themselves, or never before so connected and tried. The several public functionaries were called to their respective stations; and the constitutional principles and restrictions, applicable to each, began to operate. Maryland, with her confederates, then, but not until then, set out upon that career of prosperity to which there is no parallel among the nations of the earth.

Hence it appears, that our government was not brought forth at once, complete in all its parts; that it was not the work of one election, of one, or of two sessions; of one or two years; but, that it was created and established by parts, as times, means, and circumstances would allow. But, the matter, now under consideration, does not involve an inquiry into the manner in which all the several parts, and provisions of our constitution were put into operation. The present subject necessarily carries our investigations no further than to the judiciary; and to but one single question relative to that department; that is, when and how those judicial salaries were ascertained and settled, which are required by the Declaration of Rights to be secured to the chancellor and to the judges during the continuance of their commissions.

A *salary* is a compensation for services rendered; it is the periodical payment of a certain value, *in money*, for work and labour done. The provision of the Declaration of Rights, which commands the legislature to *secure* to the chancellor and judges their salaries, must have been predicated upon the *capacity* of the State to effect the *security* required. If no revenue could be raised, *in money*, no salary could be paid *in money*. And, if the money,

(*n*) The battle of Camden was fought on the 16th of August 1780; and the British army was captured at Yorktown on the 19th of October 1781. (2 *Ram. His. U. S.* 349 & 454; *See the Votes and Proceedings of the House of Delegates of the 3d of January, the 2d February, and the 25th, 29th, and 30th of May, and the 9th of June of the year* 1781; *the 15th of May* 1782; *and the 8th of May* 1783; *with the acts of May* 1781, *ch.* 1, 5, 12 *and* 13, *and November* 1781, *ch.* 5.) The necessity of immediately reinforcing the army and filling its ranks seems to have been deemed so urgent, that the acceptance of *able bodied slaves* as recruits was authorized with the consent of the owner.—(*October* 1780, *ch.* 43, *s.* 4; 2 *Life J. Jay*, 31.)

or the circulating medium of the country had no value; or a value continually fluctuating, and which it was impossible to ascertain, it would be impossible to fix and secure a salary of any value to any officer; since there was not any such *money or standard* by means of which any amount in value could be ascertained and secured. These propositions are self-evident.

The salaries of the chancellor and judges were not secured, as required by the Declaration of Rights, until the year 1785. The causes of their not being so constitutionally secured, before that period, were the fluctuation and depreciation of the circulating medium of the country; the actual poverty of the State; and the very greatly embarrassed condition of its finances. These facts shall be established; and it will then be shown, that the General Assembly, themselves, referred to those circumstances as the foundation of their reasons for not securing the salaries of the chancellor and judges, as they were required to do by the Declaration of Rights.

During the first nine years of the republic the salaries of the chancellor and judges were, none of them, ascertained and secured, according to the Declaration of Rights. They were all, alike, settled by annual appropriations, given at the pleasure of the legislature; at first, by mere resolutions; and then by the bill for the payment of the civil list; and their *amount* varied according to the opinions of the legislature, and the circumstances of the State. In the year 1777, soon after a chancellor was appointed, it was directed, that a yearly salary should be paid to him at the rate of *three hundred pounds* current money. For the year 1778 he was to receive a yearly salary of *seven hundred and fifty pounds* common money. It was declared, that for the year 1779 he should be allowed *twelve hundred and fifty pounds*. For the year 1780 it was determined, that a salary of *twelve thousand five hundred pounds* per annum should be allowed the chancellor. For the year 1781 his salary was fixed at *six hundred pounds*, to be paid in Spanish milled dollars at seven shillings and sixpence each, or in gold, or other silver in proportion, or *in bills of credit at the passing value*. The provision for the payment of judicial salaries, during each of these five first years, was made simply by a resolution passed at the last session of each previous year. As a compensation to the chancellor, for his services for the year 1782, he was to be paid *seven hundred and fifty pounds* in bills of credit of the last emission at par, or *in wheat*, at seven shillings and six-

pence per bushel. For the year 1783 his compensation was fixed at *six hundred pounds*. For the year 1784 it was, in like manner, settled at *six hundred pounds;* and it was declared, that for the year 1785, the chancellor shall be allowed a salary of *six hundred and fifty pounds* current money. The provision for the payment of the salaries of the chancellor and judges, for each of those four years, was made by an act passed annually, and usually entitled "an act to settle and pay the civil list."(*o*)

Hence, it appears, that during a period of nine years, all judicial salaries were in a most unstable, and insecure condition. The chancellor's salary, within that time, fluctuated from *three hundred pounds* to *twelve thousand five hundred pounds*, in nominal amount; and, except for the years 1783 and 1784, it was continued at the same amount no two years in succession. The causes of these variations, and of this uncertainty, will be found in the then condition of the circulating medium; and in the low, distracted state of the public finances; not in any mere caprice of the legislature; or in any strange whims of theirs about the court of chancery; for, during that period, the court continued its course steadily, and was then acknowledged to be one of the most valuable tribunals of Maryland.

"These United States (said the Congress of the Union) having been driven into this just and necessary war, at a time when no regular civil governments were established of sufficient energy to enforce the collection of taxes, or to provide funds for the redemption of such bills of credit as their necessities obliged them to issue, and before the powers of Europe were sufficiently convinced of the justness of their cause, or of the probable event of the controversy, to afford them aid or credit; in consequence of which, their bills increasing in quantity beyond the sum necessary for the purpose of a circulating medium, and wanting at the same time specific funds to rest on for their redemption, they have seen them daily sink in value, notwithstanding every effort that has been made to support the same, insomuch, that they are now passed by common consent, in most parts of these United States, at least thirty-nine fortieths below their nominal value, and still remain in a state

(*o*) Resolutions of the 14th of April 1777; the 16th of December 1777; the 12th of December 1778; the 29th of December 1779, by which also the Chancellor was allowed £875 for his past services of that year; and the 6th of January 1781; and the acts of November 1781, *ch.* 29; November 1782, *ch.* 28; November 1783, *ch.* 31; and November 1784, *ch.* 68.

of depreciation, *whereby the community suffers great injustice, the public finances are deranged, and the necessary dispositions for the defence of the country are much impeded and perplexed.*" Such was the declaration of Congress in March, 1780, the correctness of which was solemnly acknowledged by the Maryland legislature in the June following.(*p*)

But, even as early as February, 1777, the General Assembly of Maryland had declared, *that the quantity of paper then in circulation greatly exceeded the medium of commerce.* In the early part of the year 1779, wheat sold for *fifteen* to *twenty pounds* per bushel; and in the year following it sold as high as *thirty pounds ten shillings* per bushel, in the then currency of the State. At the close of the year 1779, a committee of the Delegates stated, "that every necessary of life had risen to forty prices at least." Paper money continued to depreciate so rapidly, that in March of the year 1781, it passed at one hundred and thirty for one, and soon after, some kinds of it, ceased to circulate at all.

At the close of the year 1781, the pecuniary resources of Maryland appear to have sunk to their lowest point of depression. Every effort had been made to prevent a total bankruptcy, but without effect. The State seems to have been forced into an open and solemn acknowledgment of its utter inability to pay its debts for some time to come. The money of the country, under the various denominations of *provincial bills*, *continental bills*, *convention bills*, *state continental money*, *state money*, *black money*, and *red money*, which had, from time to time, been issued—and had, so far, been one of the most potent means of sustaining the cause of our independence, had so sunk in value, as it increased in quantity, as to have become at length absolutely worthless, and no longer to be respected, in any shape, as *money*. It was estimated, that the whole amount of coin, then in this State, did not exceed one hundred thousand pounds; and that it would be impossible to collect by taxation a sufficiency to answer the demands upon the government. A committee of the Delegates, in December 1784, stated, that the great fluctuation, and inequality in the valuation, from 1778 to 1782, inclusive, of the property in the State, especially of land, rendered it impossible for the legislature to ascertain the sum that any tax would produce.

(*p*) The Journals of Congress of the 18th of March 1780; and the act of June 1780, *ch.* 8.

Finding it impossible to bring money into the treasury, of sufficient value to meet the exigencies of the times, the General Assembly, at their first session in the year 1780, authorized and required the payment of taxes in wheat, flour, beef upon the hoof, pork, and tobacco, at specified rates. The resolute freemen of those days appear to have cheerfully paid into the treasury their last dollar; and then to have contributed with alacrity, under all the wasteful disadvantages of such a mode of contribution, a share even of their provisions for the support of those who had taken the field in the common cause. These taxes in kind, or these "*specifics*," as they were called in those days, were collected in many different warehouses, and places of deposite throughout the State; and, as circumstances required, were distributed and handed over to the army, or the public creditors, or sold to raise money to meet instant and pressing demands. And, as we have seen, it was made optional with the chancellor, in the year 1782, to draw his salary in bills of credit of the last emission, or *in wheat*, one of those *specifics*. Such was the general pecuniary and fiscal poverty, and embarrassment of the first years of the republic, that, at the April session of 1782, an act was passed declaring, that no suit should be brought for the recovery of any debt unless the debtor had neglected to pay interest, or had refused to deliver any property he might have for sale, to his creditor in payment at a fair valuation; and further, that the time from thence until the first of January, 1784, should not be estimated in the limitation to the prosecution of suits.

About the close of the year 1783, there being every reason to hope for a rapid restoration of a sound circulating medium, with which the taxes might be paid, and the treasury replenished, the law allowing the payment of taxes *in kind* was abolished; and the *specifics* on hand were ordered to be sold. The finances of the State in fact recovered, as was expected; but they were not so soon cleared of all embarrassment, and re-established upon so regular and permanent a basis, as to enable the General Assembly, immediately, to determine what *amount* of salaries could, with propriety, be secured to the judicial officers during the continuance of their commissions, as was required by the constitution.(*q*)

(*q*) The authority for what is stated in this and the three preceeding paragraphs, relative to the paper currency and the pecuniary condition of the country in general, may be found in the history of the Union and in the proceedings of Congress;

On the 23d of December, 1777, the Senate sent to the House of Delegates a message expressed in these words: "*Gentlemen*,

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(2 *Ram. His. U. S. cha.* 18; *Jour. Cong. 25th February, and 26th August*, 1780.) And that for what relates to Maryland in particular has been derived from the public acts of her government; (*February* 1777, *ch.* 3, 9 *&* 21; *October* 1777, *ch.* 18; *October* 1778, *ch.* 18; *March* 1779, *ch.* 16; *July* 1779, *ch.* 22; *November* 1779, *ch.* 42; *March* 1780, *ch.* 25 *and* 31; *June* 1780, *ch.* 29; *November* 1781, *ch.* 29 *and* 30; *and November* 1782, *ch.* 33; *and the Votes and Proceedings of the House of Delegates of the* 12*th of November* 1777; *of the* 21*st and* 25*th of March, the* 12*th August, and the* 11*th and* 21*st December of the year* 1779; *of the* 24*th & 25th April*, 16*th May*, 1*st & 7th November, and* 16*th December of the year* 1780; *of the* 26*th of January, and* 3*d June* 1781; *of the* 14*th December* 1782; *and of the* 15*th December* 1784.) The salaries of the governor and council, of the year 1780, were directed to be paid in wheat at £22 10*s.* 0*d.*, per bushel; and the salaries of all other civil officers at a rate of exchange varying from forty for one to sixty-five for one.—(*Votes & Pro. H. Del.* 29*th January*, 1781.)

On the recommendation of Congress, the General Assembly, in order to sustain the credit of the then circulating paper currency of the country, proposed, by their act of June 1780, ch. 18, to reduce the quantity by taking up the State's quota of the bills then in circulation by a new emission of bills; for the redemption of which certain funds of the State should be pledged; and, in case those new bills should depreciate, it was provided, that such depreciation should be adjusted by the chancellor and judges, who should publish their determination in the Annapolis and Baltimore newspapers for the information and government of all concerned. After which, at the next session, the subject having been brought before the House of Delegates, they appointed a committee to inquire into, and report the state and credit of the paper money, particularly of the new bills emitted in pursuance of the law made at the then last session of the Assembly; who thereupon reported, on the 7th of November 1780, that they had inquired into the credit of the continental, convention, and state money; and had found, that the continental and convention money had depreciated to eighty for one; and that the circulation of the state money issued under the late act of Assembly had at that time totally stopped.—(*Votes & Pro. H. Del.* 7*th November*, 1780.)

It was soon after enacted and declared, that the commissioner appointed to adjust the pay due to the officers and soldiers of the troops of this State should be governed by the following scale of depreciation; that is to say, in 1777 for January and February, one and a half; March, two; April, May, and June, two and a half; July, August, September, October and November three; and December four; in 1778 for January four, February and March five, April six, May five, June and July four, August, September, and October five, November and December six; in 1779 for January eight, February ten, March ten and a half, April seventeen, May twenty-four, June twenty, July nineteen, August twenty, September twenty-four, October thirty, November thirty-eight and a half, December forty-one and a half; in 1780 for January forty and a half, February forty-seven and a half, March and April sixty-one and a half, May fifty-nine, June and July sixty-one and a half, August and September seventy, October seventy-five, November eighty, and December ninety; in 1781 for January one hundred and ten, February one hundred and twenty, March one hundred and thirty; and of the State emissions of June 1780, compared with specie, April to the 20th day three and one half, to the 30th day four, May to the 10th day five, to the 20th day six, to the 30th day six and one-half, and in June six and one half (*October* 1780, *ch.* 38, *s.* 9; *May* 1781, *ch.* 17, *s.* 2; *and ch.* 35, *s.* 2.)

We have returned with our negative the bill, entitled an act for the payment of the journal of accounts; the low state of the treasury, and the certainty of very great and speedy demands thereon, for effecting the several matters ordered in the course of this session, have induced us *to defer the payment of the journal, to a time when the money can be taken from the treasury with less detriment to the public.* We are willing to concur with a resolve for paying the clerks and other officers of the two Houses, the sums respectively due to them on the journal." This proposition was at once assented to, and a resolution to that effect was brought in and passed both Houses. This resolution furnishes a most refreshing instance of the lofty, disinterested patriotism of the revolutionary legislators of Maryland. But those were times of peculiar emergency and distress. And this resolution shows how deeply the public exigencies were felt, when legislators themselves found it necessary to set an example of the retrenchment and economy they enjoined, by abandoning *their own compensation*, while every other officer was paid to the full extent to which the acts of the State had induced him to expect to receive.

In order to do justice to the public creditors of the State and to prevent their suffering any loss by depreciation of our paper money, it was moreover enacted and declared, that in the payment of the public debts evidenced by the various kinds of certificates for money lent, services performed, property purchased, or taken, &c., adopting the scale prescribed by Congress so far as it went, all such certificates of public debt should be paid according to the following scale of depreciation; that is to say, in 1778 from the first of March one and three-quarters, from the first of September four; in 1779 from the first of March ten, from the first of September eighteen; in 1780 from the 18th of March forty; and after that day as in the abovementioned scale. (*Jour. Cong. 28th June*, 1780; *May* 1781, *ch.* 17, *s.* 2.) The purchase money of confiscated property and the taxes were, nevertheless, in some cases and in some proportions received in bills of credit and certificates at their nominal value.—(*October* 1780, *ch.* 38, *s.* 11; *May* 1781, *ch.* 20, 25, 36 *and* 37, *&c.*)

These legally established scales of depreciation it must, however, be recollected, relate only to claims against the State; as to private contracts and debts due from one citizen to another, the proper allowance for depeciation seems to have been considered as a fact to be adjusted in each case by the court of justice before which the case was brought, (*Chapline v. Scott*, 4 *H. & McH.* 94.) The American army in these years was not only deficient in clothing, but in food. The seasons both in 1779 and 1780, were unfavourable to the crops. The labours of the farmers had often been interrupted by calls for militia duty. The current paper money was so depreciated as to be deemed no equivalent for the productions of the soil. (*Ram. L. Washington, ch.* 6 *&* 8.) From this state of things it is evident, that the community must have suffered great injustice; and that the public finances being totally deranged, all the operations of the government connected with this subject must have been very much impeded and perplexed.—(*Message from the Senate, Votes & Pro. H. Del. 10th May* 1780; *Hoye v. Penn, ante* 41, *note.*)

During the whole of this distressing period, and under every aspect and change of circumstances, the legislators of the Republic appear to have been actuated by a strong sense of justice, and a firm determination to compensate every one for his services to the full extent of their worth, and of the ability of the State to pay. But while they were thus making every possible effort to render to every individual his due, and to comply with the provisions of that constitution which they had just adopted, and had declared should be sacred; they felt the necessity of having it distinctly understood, that it was not their intention, directly, or indirectly, to plight the faith of the State for the payment of any salary which might burthen and embarrass its finances after the return of peace. Accordingly, when they fixed the salaries of all officers upon the high *nominal* scale of the year 1780; and the chancellor's salary, as we have seen, was fixed at *twelve thousand five hundred pounds;* the General Assembly resolved: "That whatever salaries may be given to the officers of the civil list, in continental currency, shall be subject to the control of the General Assembly, and shall stand no longer than till the further order of the said General Assembly."(*r*)

It may then be safely assumed, as a fact incontrovertibly established, by the acts of the government, and the history of the times, that, whatever may have been the intentions or the wishes of the General Assembly, during the first nine years of the Republic, it was utterly impracticable, within that time, to comply with that provision of the Declaration of Rights, which requires the legislature to *secure* to the chancellor a salary during the continuance of his commission. But, however strongly and clearly this may be deduced from the facts and circumstances of those times; yet, if it rested on *deduction* only, and there were, in all that period, no express declarations of the wishes, understanding, and intention of the legislature to be met with, there might, perhaps, be found, somewhere, room to urge a cavil, or to press an inference, that the Declaration of Rights had been construed to allow the legislature a discretionary power over judicial salaries; that it allowed them to temporize, and to diminish at pleasure, the salaries of the chancellor and judges. But the public acts, the repeated solemn messages, and the unequivocal language of the two branches of the General Assembly, have absolutely and positively precluded every doubt and cavil upon the subject.

(*r*) Votes & Pro. H. Del. 24th December, 1779.

At November session, 1782, the Senate, on the 11th of December, sent to the House of Delegates the following message:—"*Gentlemen*—The bill entitled, an act to settle and pay the civil list, and the other expenses of civil government, may be considered by you as a money bill, to which our assent or dissent only can be given; and as you might have deemed it improper in us to make any alteration, we have returned it with a negative; we might otherwise have offered such amendments as would have met with your approbation; we are therefore under the necessity of communicating to you, by message, the reasons of our dissent.

"You will readily believe, gentlemen, that we do not mean to leave the officers of government unprovided for; on the contrary, we would willingly bestow upon them liberal, though not profuse salaries; but when the weight of taxes, already so severely felt by the people, is likely to continue, and even to be increased by a heavy accumulating interest upon a large debt, for which no funds are yet provided, and our quota of the continental debt and interest remains also unprovided for, the strictest economy in all our affairs is certainly become necessary; we therefore think that the salaries of the gentlemen of the council might be lowered to three hundred pounds each, the auditor-general three hundred and fifty pounds, and his deputy one hundred and fifty pounds; and the clerk of the council two hundred pounds; the treasurer's office, we are of opinion, may well be executed for six hundred pounds to the principal, out of which he might employ assistant clerks.

"We have another objection to the bill, more weighty than that already mentioned. The independency of the judges is essential to the impartial dispensation of justice; this principle cannot be questioned, and is recognized by the Declaration of Rights; *for, in pursuance of the principle that declaration provides, 'that salaries liberal, but not profuse, ought to be secured to the chancellor and judges during the continuance of their commissions.' Their salaries have hitherto been settled annually by the civil list bill; and consequently cannot be said to be secured to them during the continuance of their commissions.*—It may not be improper to settle annually the salaries of officers annually chosen; nothing at least in our Constitution expressly militates against an annual regulation of the salaries of such officers; but an annual regulation of the judges' salaries, is repugnant, as we conceive, to the letter and spirit of the Constitution, which meant that they should really be independent, and superior to every undue influence. *In our judg*

ment, no influence over them would be more dangerous than that of the legislature, arising from the hope of increasing, or the apprehension of decreasing salaries; an influence of this kind would have a tendency to introduce the greatest evil in government, an accumulation and union in the same persons, of the legislative and judicial powers, so wisely and expressly proscribed by our Constitution.

"*The perplexities and confusion of the times may apologize in some degree, for past inadvertency; for we are convinced, a deliberate violation of the Declaration of Rights was never intended by the legislature in any point, much less in one so essential.* However, as the enemy hath some time since changed an offensive into a defensive war on this continent, as now a regular and effectual administration of law and justice hath taken place amongst us, it is become the *duty* of the General Assembly to establish permanent salaries, and to secure a punctual and full payment of them to the judges.

"We therefore deem it both expedient and necessary that a bill, distinct from the civil list bill, should originate in your House for that purpose; such a bill will meet with our ready concurrence; provided, that the salaries of the judges be liberal, compared with the present exigencies of the State; for what might now be esteemed liberal under those exigencies, may not appear so hereafter, when, from a happy change of circumstances, the resources of the people shall be greater than at present. In this point of view, we consider the salaries settled on the judges by the present bill, as sufficiently liberal.

"If on a revision of the subjects of this message, your ideas should coincide with ours, as to the quantum of the salaries proposed by us to be altered, and settled annually on all the other civil officers of government, except the judges, a bill originated by you for that purpose will have our ready assent."

To this message from the Senate, the Delegates on the 12th of January, 1783, sent the following answer: "*May it please your honours*, We cannot but consider the bill for the payment of the civil list as a money bill, and therefore subject to no amendment by your honours. By a rule of this House, before any person is named to any office or appointment, to which any salary or allowance is annexed, the allowance or salary is first ascertained. The reason of this provision is obvious, to prevent any opinion that the salary is given to the person and not to the office, and the choice of the officer removes all suspicion of partiality or prejudice. We

do not think the salaries allowed by our bill profuse or extravagant, and we cannot go into a reconsideration of them without departing from our rule, and subjecting ourselves to a censure we would wish to avoid.

"*We agree with your honours, that the salaries to the chancellor and judges ought not to be settled by an annual regulation, but ought to be secured to them during the continuance of their commissions; and, as soon as we can furnish a permanent and perpetual fund out of which their salaries can be paid, we will send you a distinct bill for that purpose, and we hope this will be in our power before the expiration of the year; we have returned your honours the bill, and hope it will meet your assent.*"

In reply to which the Senate, on the 14th of the same month, sent to the Delegates the following message: "*Gentlemen*, We have reconsidered and sent you the civil list bill with our assent; you have laid us under the disagreeable necessity either of lengthening the session for some days, at a time when every gentleman expects to rise, or assenting to what we do not approve; we must therefore declare to you, that we shall hereafter adhere closely to our propositions, and have only at this time assented to the bill to prevent the further continuance of the session, or the confusion which would arise from leaving the civil officers without any provision."

From these messages it clearly appears, that both branches of the General Assembly agreed, that the salaries of the chancellor and judges ought to be secured, and that the legislature *could not constitutionally diminish or withhold them at pleasure.* But the Delegates, it seems, could not be persuaded, that the State then had it in its power, or could raise the funds to secure those salaries as required by the Constitution. These messages need no comment. Yet it will be well to recollect, that some of those, who approved those messages, had been themselves distinguished members of that convention which framed the Constitution.

At the November session of 1783, this subject was again taken up, and a committee appointed by the House of Delegates; "to consider what arrangements might be necessary and proper with regard to the civil establishment; who reported, "that the chancellor, the judges, and other officers on the civil establishment holding commissions during good behaviour, *ought to be rendered independent by having salaries annexed to continue during their continuance in office*," which report was concurred with. In consequence

of which the same committee made a further report to the House, specifying sundry articles as being, in their opinion, "proper objects of taxation for establishing *permanent funds*, for the payment of moneys that become due on the civil list." But on the second reading of this report, the laying of taxes on the proceedings in courts of law and equity, which was considered as the most productive of the ways and means for raising the proposed fund, was rejected; and the aggregate of the residue not being sufficient for the payment of the civil list, the whole project failed. Hence, owing *solely* to the declared *inability* to provide funds, the judicial salaries were again settled for the current year and no longer.

At the next session leave was given, in the House of Delegates, to bring in a bill to establish a *permanent fund* for the payment of salaries to the chancellor and judges, *during the continuance of their commissions;* and a bill was accordingly reported to the House; but it seems to have been virtually superseded or negatived by the civil list bill, in which, as reported, the salaries of the chancellor and judges were to have been secured to them, "*during the continuance of their commissions;*" but, those words were stricken out on the second reading, by a majority of only *one* vote, and the bill was thus passed, bestowing the judicial salaries "for the current year only." At this session the propriety of giving to judicial salaries the requisite constitutional security had been introduced and pressed upon the attention of the General Assembly by the Intendant of the Revenue in the conclusion of his report, in which he says, "Permit an old servant to recommend to your most serious consideration, the increasing of the chancellor's and the judges of the General Court's salaries. Their present allowance will not support them, whilst provisions and other necessaries continue at their present prices. Your lives, liberties and properties, depend much more upon the abilities and integrity of gentlemen who fill these judicatories than perhaps at first view may be imagined. *These officers ought to be put above want, and whatever is given ought to be absolute, and without control, and not be obliged to look up annually to the legislative body for their next year's support.* The increase I would recommend would be £150 to each, amounting in the whole to only £600; a small tax upon law proceedings would bring in much more than this sum to the treasury."

At the session of the General Assembly held in November, 1785, there were convened, as our statute book will show, the most

worthy and enlightened body of legislators Maryland ever saw. On the 24th of November of that session, the Senate sent the following message to the House of Delegates:

"*Gentlemen*, We think it a duty incumbent on us to call your attention to the state of our judiciary department. The thirtieth article of our bill of rights, for very obvious and important reasons, enjoins that the chancellor and judges should be independent, not only by holding their commissions during good behaviour, *but also by having proper salaries secured to them during the continuance of their commissions. It is the duty of the legislature both to fix the salary of the chancellor and judges, and to provide funds by a permanent law for the regular payment of such salaries. This duty has not been complied with; and instead of being in that state of independency required by the bill of rights, and strongly dictated by the first principles of free governments, the chancellor and judges have hitherto remained dependent for their salaries upon the annual votes of the legislature.* This House have been of opinion for a considerable time past, that there was no circumstance which would justify the legislature in delaying to make the provision required by the constitution; and our opinion hath been ineffectually communicated to a former House of Delegates; but we trust, gentlemen, you will concur with us in sentiment, that this very important subject ought to be properly attended to early in this session; and that you will in due time send us a bill for fixing the salaries of the chancellor and judges, during the continuance of their commissions, and for the payment of those salaries with certainty and regularity. The experience of past sessions induces us to apprehend we may find ourselves under the necessity of determining too hastily, matters, by which the welfare of this State in particular, and of the United States in general, may be essentially affected, and which consequently demand the maturest consideration.

"Towards the close of each session, when from its length and the approaching severity of the season the House of Delegates have been usually anxious to rise, the most important part of the public business hath been transmitted to the Senate. As the Constitution does not allow this House to propose amendments to money bills, the evil consequence must readily occur, if we should think it necessary to dissent to them at a time when the House of Delegates will not agree to continue sitting to reassume the discussion of the subject matter of such bills, or even to enter into a consideration of such amendments as the Senate may propose to

others. We therefore request that such important bills as are intended to be offered for our consideration by your House, may be sent to us so early in the session, that a fair opportunity may be given to us of considering them with that deliberation which every interesting act of legislation requires."

This message not having produced *all* the good effects desired, the Senate, on the 19th of January following, wrote again to the Delegates as follows: "*Gentlemen*, Upon reading your bills to establish permanent salaries for the governor, chancellor, and judges, we are of opinion the provision proposed to be made for them is not a sufficient compensation for their services, nor will it enable them to support with dignity the rank to which their superior trusts entitle them. *The greatest security which a people can enjoy under any government, results from a strict and impartial administration of justice.* The independence of the magistrate invested with this important trust, has been the first care of the legislator, who wished the government to be permanent and the people happy. By a liberal provision being made to the chancellor and the judges, they can dedicate their whole time and abilities to the service of the public. Gentlemen of merit and knowledge will be thereby induced to engage in this most important trust, and their personal character and abilities will give weight to their decisions, and security to the government. We are very sensible, that the state of our finances requires economy, but flatter ourselves you will upon reconsideration, think with us, that the salaries of the officers referred to in this message may be enlarged, without incurring a censure for profusion. *As there are no funds particularly provided for the payment of those salaries, it would be very agreeable to us to mortgage all the unappropriated revenues of the State for the payment of them.* We have sent you the bills for reconsideration, in hopes, that you will consent to an enlargement. The following salaries would meet our perfect approbation: To the Governor £1200. *To the Chancellor* £1000. To the Judges of the General Court, each £850. Judges of the Court of Appeals, each £500. Judge of the Court of Admiralty £500.

"We submit to your consideration the propriety of passing a law to lessen the number of the Court of Appeals to three, when circumstances admit. If upon reconsidering the subject, you do not think it proper to make any further allowance, or to make the funds more certainly productive of a sufficient sum to pay salaries,

we wish you to return us the bills, that we may determine on them."

To this message from the Senate, the Delegates on the 23d of the same month made the following reply: "*May it please your honours*—This House have considered your message of the 19th instant, by James Lloyd, Esquire. We are very desirous of making a liberal provision for the governor, the chancellor, and the judges; and wish the circumstances of our people would justify this House in acceding to the salaries proposed by the Senate. *If time will permit, we shall attempt to provide particular funds, to secure the payment of the salaries established by our bill.* It will always be in the power, as it will certainly be in the inclination of the legislature, to make such alterations in the present salaries, as the ability of government will permit.

"*As the chancellor must necessarily have great trouble, from the number of disputes relative to the grants of lands, we are willing to make him compensation; and to add a clause to the bill for the civil list, allowing him the sum of ——— for the next year.*

"This House will consent to limit the number of judges in the Court of Appeals; and that when any vacancy may happen, the number shall not exceed three, until the abilities of the State will justify an increase of the establishment."

Soon after the sending of the last of these messages, on the 7th of February, 1786, the act of 1785, ch. 27, received the assent of both Houses, and became a law. This is the first legislative act which *secured* to the chancellor and judges their salaries *during the continuance of their commissions.*

This review, which we have taken of the first nine years of the Republic, shows, that during the whole of that time, that provision of the *thirtieth* article of the Declaration of Rights, which requires the legislature to secure to the chancellor and judges their salaries *during the continuance of their commissions*, was waived. But the reason why it was so left dormant and inoperative, is most satisfactorily shown. The causes were imperative and uncontrollable; they amounted almost to a physical impossibility to give effect to that provision of the Declaration of Rights. Such causes have, at various times, been held to be an allowable excuse, for the widest departures from some of the most important provisions of the Constitution. Thus, in the year 1780, when this State was imminently threatened with being made the immediate seat of war, the governor was invested with the dangerous power of seizing any

persons he suspected of treachery to the country, and of having them tried and executed according to martial law. Nothing could *justify*, but the times seemed to *excuse* the measure.(*s*)

No one can look over, and meditate upon the condition and circumstances of Maryland during the first nine years of the Republic, and say that it would have been entirely safe, and proper, and just, either to the State, or the officer, to have, at once unchangeably secured to the chancellor and the judges their salaries, during the continuance of their commissions. Nor can any one, after attentively perusing the before recited messages and acts of the General Assembly, assert, that the legislature, previous to the year 1785, ever intended to claim, in any way, any discretionary power whatever, to unsettle, to diminish, or to withhold, the whole or any part of the salary of the chancellor or of a judge.

On the contrary, these two positions are most clearly and incontrovertibly established: *first*, that the salaries of the chancellor and judges were not secured during that period, *because, and only because, of the then circumstances of the State.* And *secondly*, that the legislature always expressly admitted the full force of the constitutional obligation; *but, alleged the circumstances of the State as the only reason for their not securing those salaries as they were required.* Therefore, any legislators who would now assume all, or any of that discretionary power, then exercised over the salaries of the chancellor and the judges, must produce reasons as cogent, an excuse as self evident, and show the present operation of causes as powerfully overruling and imperative as those which then existed.

The act of 1785, ch. 27, carefully recites the provision of the Declaration of Rights respecting judicial salaries; distinctly recognizes the constitutional obligation the legislature were under to *secure* to the chancellor and the judges salaries, *during the continuance of their commissions;* and then gives to the chancellor a

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(*s*) June 1781, ch. 12, and November 1781, ch. 5, notes Hanson's Laws of Maryland. It seems that Maryland was not singular in thus leaving her judges without any properly settled salaries during this period of public distress. In a letter of the 23d of February 1782 to G. Clinton, governor of New York, from John Jay, he says: "Mr. Benson writes me that your judges are industriously serving their country, but that their country had not, as yet, made an adequate provision for them. This is bad policy, and poverty cannot excuse it. The bench is at present well filled; but it should be remembered, that although we are told that justice should be blind, yet there are no proverbs which declare that she ought also to be hungry." (2 *Jay's Life*, 93.)

salary of *six hundred and fifty pounds* per annum during the continuance of his commission. The *appropriation*, or provision made for the payment of this salary is to be found in the third section of this act, and is expressed in these words; "the said salaries shall be paid quarterly, out of the supplies raised every year, *until the General Assembly shall make other provision for payment;* and the said salaries, for the ensuing year, shall be paid out of the arrearages of taxes due for the year seventeen hundred and eighty-five." By the act of 1792, ch. 76, it was declared, "that the chancellor shall be entitled to receive, *for all duties and services whatever, prescribed, or to be prescribed by law*, an annual salary of nine hundred and fifty pounds current money, during the continuance of his commission, to be paid quarterly. By the four last sections of this act, an *appropriation* or provision was made for the payment of that salary out of a particular fund, to be raised by taxes on proceedings in chancery and the land office, and money arising from the sale of vacant land; which was to be specially set apart for that purpose. This appropriation, or special fund was temporary, and limited to *five* years, was continued, by the act of 1797, ch. 51, for *seven* years longer; and was then *virtually* applied to general purposes, by operation of the act of 1798, ch. 86, and *expressly* so applied by the acts of 1804, ch. 64 and 108. By a resolution passed at November session, 1796, an addition of *two hundred dollars* was made to the chancellor's salary for the ensuing year.(*t*)

(*t*) On running the eye over the acts and titles of acts passed by the General Assembly under the provincial government of Maryland, in Bacon's revision, it cannot but strike the attention of every one how large a proportion of them, even those of the most important character, were limited in their operation to a specified period of time, and that too, of a very short duration. This temporary mode of legislation must have been attended with very considerable inconvenience. But it appears to have been resorted to by the colonists as the only means of defending their rights and interests against the undue exercise of the royal and proprietary prerogatives. It will be recollected, that any act, after it had been passed by the General Assembly, however beneficial or necessary to the people, might be annulled by being dissented from by the lord proprietary or by the king; and therefore, to keep the proprietary or the king within reach of the people and dependent upon them by rendering it necessary to convene their representatives at short intervals to reenact or continue laws necessary for the support of the government; (7 *Mass. His. Soci.* 129;) and to extract from the proprietary or king the assent to new laws which might be called for by the people, it was deemed expedient, by the General Assembly, to limit their legislative enactments to a very short duration. Indeed it is said, that some of the colonial General Assemblies, in order to preserve their independence of the king, had done almost every act of legislation, by votes or orders, even to the repealing the effects of acts, suspending establishments of pay, paying services, doing *chancery* and other judicatory business, &c. having their effect without being reduced to the form of

The *appropriation* for the payment of this sum was general without specification. By the act of 1797, ch. 71, it was declared, that the chancellor "as chancellor and *judge of the land office* shall be entitled to receive *four hundred and fifty-six dollars and fifty-seven cents*, in addition to the permanent salary fixed by law." The *appropriation* and provision for the payment of this addition was made by the second section of this act in these words; "the said sum shall be paid at the same time, and in the same manner during the continuance of this act, as his permanent salary is by law directed to be paid." By the act of 1798, ch. 86, it is declared, "that the chancellor shall be entitled to receive, *for all duties and services whatever, prescribed or to be prescribed by law*, an annual salary of *twelve hundred and seventy-five pounds* current money and no more." The *appropriation*, and provision for the payment of this salary is general; it is "to be paid quarterly by the treasurer of the Western Shore." There is no designation of any fund as in the act of 1785, or in that of 1792.

It appears then, that the salary of the chancellor has grown up and increased with the wealth, business, and population of the State from 1785 to 1798. It has never, during the last forty years, been in any manner *diminished*, nor at any time, prior to the 21st of February in the year 1825, been *attempted to be diminished.* That the amount, thus, from time to time, given to the chancellor was secured to him during the continuance of his commission, has never, from any thing that appears in the votes and proceedings of the General Assembly, or in our statute book, been at any time called in question previous to the last session of the legislature. If the General Assembly have any discretionary power to *withhold*, or to *diminish* the chancellor's salary, it cannot, as we have seen, arise from any thing contained in the Declaration of Rights; nor can it be sustained by any precedents of cases in which any previous legislature have distinctly asserted and main-

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acts, or being submitted for the allowance or disallowance of the crown. (*Pown. Adm. Col.* 75.) This practice of the colonial legislatures, of passing temporary laws and special orders was strongly condemned in England as a pernicious evasion of the king's prerogative of approving or disapproving of all their legislative enactments; and the governors were accordingly positively instructed to give their assent to no such acts or orders. (2 *Chal. Opin. Em. Law*, 58; *Pown. Adm. Colo.* 75; 1 *Chal. Opin. Em. Law*, 350.) But, it seems, this inconvenient practice had become so much a habit in Maryland, that it has been too long continued: since the revolution, by which the causes that had suggested and rendered it expedient, have been completely removed.

tained any such constitutional power. If then, any *colourable pretext* for the exercise of such a discretionary power to *withhold* or to *diminish* the chancellor's salary is any where to be discovered, it must, it is presumed, be sought for among the implications, inferences, and deductions to be gathered from some one, or all of the acts passed since the act of 1785, which, in any way, give to the chancellor a compensation for his services. Let us then carefully consider these acts.

The House of Delegates, of the last session, seem to have deemed it necessary, not only to except, from the operation of their general continuing act, the law of 1798, ch. 86; but also, that of 1797, ch. 71. The last mentioned act was expressly limited, in its duration, to the 20th of October, 1800, and until the end of the next session of Assembly that should happen thereafter; when, even if it had not been virtually repealed by the act of 1798, ch. 86, it must have expired of itself, *so far as such an act could constitutionally expire;* since there is no law to be found, by which it has ever been continued, either generally or specially. Therefore, this act might have been, very safely and prudently, passed over by the Delegates, without at all enfeebling the force of any argument they could possibly have urged in support of the right they had assumed to *reduce* the chancellor's salary. But, since the act of 1797, ch. 71, has been thus invoked into this controversy, an explanation may be deemed necessary.

The Court of Chancery of this State is, in all respects, substantially analogous to that of England; but, in Maryland, the chancellor has long been invested with certain powers, and a jurisdiction, which are exercised in a name and character, altogether peculiar to this State; and that is, "*as judge of the land office.*" Before the revolution the lord proprietary was the owner, in his individual and private capacity, of all the land and territory in Maryland; which he sold or gave away at pleasure. Not long after the settlement of the province was commenced, a land office was established, through which any person might obtain a title for any vacant land, on complying with the established conditions and regulations. As the settlements extended, and the sales of land were multiplied, numerous controversies arose as to the formality and correctness of the incipient and original titles, thus obtained from the proprietary. For the purpose of determining these controversies, *a judge of the land office* was appointed, about the year 1680; and the chancellor of the province was charged with the

determination of those matters, either as judge, or as assistant of the judge of the land office.(*u*)

On the revolution, although all the powers, rights, and property of the proprietary devolved upon the State, or were abolished and confiscated, there was no express provision in the constitution for a *judge of the land office*. But, as it would seem, it was clearly understood, that the chancellor of the State, of course, succeeded to, and might rightfully exercise all the power and authority of judge of the land office, which had, at any time, belonged to the chancellor of the proprietary government. And this additional capacity and character, of the chancellor of this State, was distinctly recognised and confirmed by the act of November, 1781, ch. 20, s. 6. The chancellor of Maryland is then, by virtue of his office, *judge of the land office;* and, as such, he is invested with jurisdiction to hear and determine all cases, as to the equitable right, or incipient title acquired under warrants and certificates of survey, which may become the subject of contest in the land office. This jurisdiction of the chancellor, at first, extended over the whole State; but, by the act of 1795, ch. 61, s. 5, *a judge of the land office*, for the Eastern Shore, was directed to be appointed; who was clothed with all the original jurisdiction exercised by the chancellor on that shore; reserving, however, an appeal to the chancellor. And, by the act of 1795, ch. 70, it was declared, "that the judge of the land office for the Eastern Shore should receive a salary of *one hundred and fifty pounds* per annum, *during his continuance in office;*" which salary has been regularly paid to that officer ever since.

Thus, it is obvious, that the two offices and functions of *chancellor*, and *judge of the land office*, have long been united in, and exercised by the same individual. The provision of the Declaration of Rights, relative to the independency and uprightness of judicial officers, speaks only of the *chancellor;* of *his* holding a commission during good behaviour; and of *his* salary being *secured* to him during the continuance of his commission. But, his other character, of *judge of the land office*, is no where noticed in the Declaration of Rights or Constitution, in any manner whatever. The office of chancellor, having been created by the constitution, the executive is bound to appoint *a chancellor;* and the legislature is, in like manner, bound to secure to *him* a salary

(*u*) Cunningham *v.* Browning, ante 299.

during the continuance of his commission. But, the constitution being wholly silent as to *a judge of the land office*, the executive and legislature are under no *such* constitutional obligation to appoint and provide for *such* an officer. This was always the clear and distinct understanding of the General Assembly.

At the session of 1785, when the legislature were about to pass that act, which first secured to the chancellor his salary during the continuance of his commission, it will be seen, by the before recited message from the Delegates, that this distinction between the chancellor's *two characters* was adverted to as a matter then familiarly and well understood. For, it is evident, that their disinclination to give a higher salary, at that time, arose from the conviction, that whatever salary they should give him *as chancellor*, must be given *during the continuance of his commission*, during which period it could not be diminished or revoked; and, being unwilling so to pledge the State, at that time, for the payment of an amount which they admitted was then reasonable, they gave him an addition to his salary in another character; that is, *as judge of the land office;* in which form, that addition was always subject to be renewed, reduced, or withdrawn at pleasure. The chancellor was thus, at the session of 1785, for the first time, separately compensated in *each* of his two distinct characters. By the 27th chapter of that session, a salary was secured to him during the continuance of his commission, *as chancellor;* and by the 74th chapter of the same session, he was additionally compensated for his services, *as judge of the land office*, for the current year. In the one character his salary, being *secured* by the Declaration of Rights, was intangible, in the other, his compensation was renewable from year to year, and to any amount, *at the pleasure of the legislature.*

By the act of 1785, ch. 74, the sum of *two hundred pounds* was given to the chancellor, *as judge of the land office*, for the then ensuing year. The sum of *one hundred pounds* was given to him, *in the same character*, by the civil list bill of each successive year until 1792; when his salary, *as chancellor*, being increased, his compensation, *as judge of the land office*, was discontinued until the year 1797; when an addition was again made to his salary of *four hundred and sixty-six dollars and fifty-seven cents*, in the twofold character of *chancellor and judge of the land office.* And at the next session of the legislature, the character of *judge of the land office* was again dropped, and the whole, with a still further

addition, was put together and given in the constitutional character of a salary to *the chancellor;* similar to that described by the act of 1792, to which this act, for greater certainty, was by its title declared to be "*a supplement.*"

In every instance, from the year 1785 to the present time, where it was the express intention of the legislature to give an additional compensation to the chancellor, *during their pleasure*, it was given to him as *judge of the land office.* And in all instances, where it was intended to compensate him according to the terms of the Declaration of Rights, the salary was given to him *as chancellor.* This is manifest from all the acts, and the whole course of legislative proceedings from that time down to the 21st of February 1825. For, it certainly could not have been the intention of the Assembly of 1798 to loosen and set afloat the *whole* of the chancellor's salary; to be paid or not according to the mere whim or caprice of every succeeding body of legislators, in utter contempt of the constitution; after the very solemn, and repeated declarations as to the constitutional obligation the legislature was under to *secure* it to him *during the continuance of his commission*, that had been so carefully expressed and recorded.

But, it may be said, that if the act of 1798 is suffered to expire, the act of 1792 will be virtually revived; and, from the nature of the last mentioned act, it cannot be repealed; and, therefore, the salary cannot be reduced below what the act of 1792 has given. This position concedes the point, that the legislature is limited in its control over a part of the amount of the salary. Now, if the General Assembly had intended, by the act of 1798, to hold a discretionary power over the sum of *three hundred and twenty-five pounds*, which is the difference between the salary given by the act of 1792, and that given by the act of 1798, why was not the well known and established precedent followed, of giving that additional sum to the chancellor annually *as judge of the land office?* But the *manner*, and the *character* in which the salary was given, have left not the least doubt about the meaning of the General Assembly, in passing the act of 1798. The act of 1797, ch. 71, having added to the chancellor's salary, in a dubious form, by giving the addition to him "*as chancellor and judge of the land office*," it was not perfectly certain, that the indicated character "*as chancellor*," would, when qualified by the expression, "*and judge of the land office*," draw after it the constitutional security to the whole or only to a part of this addition; and, therefore, to remove this doubt,

and to clear away all ambiguity, at the following session, by the act of 1798, ch. 86, the whole was given to the chancellor, *as chancellor;* manifestly with the intention of drawing over the whole salary, that constitutional *guarantee and security* which indisputably and rightfully belonged to such a salary when given to the chancellor *as chancellor.*

That this was the distinct understanding of those legislators who passed the act of 1798, will be placed beyond all manner of doubt, by comparing the phraseology and allusions of the act of 1792, with those of the act of 1798. Prior to the year 1792, the chancellor had received some additional compensation *as judge of the land office;* and, it is to that, which the act of that year refers by the expressions, "*for all duties and services whatever prescribed or to be prescribed by law.*" In other words, that legislature meant to say, that the chancellor shall no longer be compensated in *two different characters;* the one part of the compensation to be secured according to the constitution, and the other during pleasure; but, that the whole should be constitutionally given and secured to him *as chancellor.* By the act of 1797, ch. 71, a part of the chancellor's compensation was given to him "as chancellor and judge of the land office." And, therefore, when, by the act of 1798, ch. 86, the legislature declare, "that *the chancellor* shall be entitled to receive *for all duties and services whatever prescribed or to be prescribed by law*, an annual salary of twelve hundred and seventy-five pounds," they meant precisely the same thing, by those identical same words, that was meant by the legislature of 1792; that is to say, that the whole of the chancellor's compensation, as well that which had been constitutionally *secured* to him, as that which had been, until then, bestowed upon him during their pleasure, should all, henceforth, be secured to him during the continuance of his commission.

The last House of Delegates, in excepting the act of 1797, ch. 71, from their general continuing law, evidently acted under the impression and belief, that whatever salary was given to the chancellor, *as chancellor*, was secured to him during the continuance of his commission. For, if they were not so impressed, why did they in express terms refuse to continue that law, which had never been continued; and, by its own limitation, had expired more than twenty years previous to that time? But seeing, that the additional salary, given by the act of 1797, ch. 71, was given to the chancellor, "*as chancellor and judge of the land office;*" and apprehend-

ing, that although it was, in some respects, temporary in its terms; and although it had never been continued by any legislative act; yet, that it would be virtually continued by operation of the constitution; they, therefore, deemed it necessary, expressly and by name, to except this act out of the operation of their general continuing law; or, in other words, to discontinue it; and, as they believed, to make such a declaration respecting it as would be equivalent to *an absolute repeal.* If such was their understanding of the act of 1797, when taken in connection with the constitution—and it is difficult to perceive how they can be otherwise understood—the last House of Delegates were certainly correct in considering both of these acts; as well that of 1797, as the one of 1798; as well that which had not, as that which had been continued, as standing in the way of the execution of their resolution to *reduce* the chancellor's salary. But the act of 1798, ch. 86, virtually and effectually, repeals all antecedent acts which had been passed for ascertaining and fixing the *amount* of the chancellor's salary; and is, itself, firmly and immovably sustained by the Declaration of Rights; and needs no continuing, or other act, for the mere purpose of designating what shall be the *amount* of the chancellor's salary.

So much then, as to all those acts, which speak of, or in any manner have heretofore, compensated the chancellor in his character of *judge of the land office.* The whole of them might have been passed over in silence, if the Delegates of the last session had not invoked them into this controversy. But, it is believed, that, in whatever manner they may be considered, nothing can be deduced from them, which can, in any way, impair the right which the present chancellor has to the salary designated by the act of 1798. Let us now proceed to the consideration of those acts of Assembly under which the chancellor has been heretofore, and until the 26th day of February last, compensated for his services *as chancellor.*

Whatever inference may be deduced from the language of the first section of the act of 1798; and, however conclusive it may seem to be, that any salary given to the chancellor, *as chancellor,* must be, and is *secured* to him, by virtue of the Declaration of Rights, *during the continuance of his commission;* yet, it may be said, that in this instance, and from this act of 1798, no such inference can be deduced; no such intention can be ascribed to the legislature who passed it. Because, by the second sec-

tion it is expressly declared, that "*this act is to continue and be in force till the twentieth day of October, eighteen hundred, and until the end of the next session of Assembly which shall happen thereafter.*" In consequence of which limitation, it was, by the act of 1800, ch. 87, continued to the 30th of October, 1805, and the next session of Assembly thereafter; and has been continued from time to time since, until the 26th day of February, 1825;—which express limitation, and reiterated continuances do, in the most positive and distinct manner, exclude every thing like a perpetual character from this act, in every manner and form whatever.

If this act related to the salary of the State's agent; the adjutant general; or any other salary, which the legislature may give or take away at pleasure; or, if it related to any *subject*, the power of legislating on which was restricted, in no manner whatever, by the constitution, then it could not be denied, that this act would be altogether temporary in its nature; and, unless continued or otherwise provided for, would expire at the appointed time. But, this act of 1798, is in no respect a law of *that* description. It relates to a salary, the *security* and *duration* of which is fixed by the Declaration of Rights. The legislative power over the *subject* of this law is, expressly and positively restricted and limited by the constitution;—and being an act of this latter description, it must be construed and governed accordingly.

Respecting judicial salaries, there are three distinct positions, which have been, long since, clearly established; and which have grown up and become incorporated with our political system. The first, regards the *amount* of such a salary; the second its *duration;* and the third the *appropriation*, or provision for its payment. To keep our ideas clear upon any subject, and to reason correctly, we should carefully designate things, that differ, by appropriate names. We think only through the medium of words; and, according to one of the ablest and the best of the English lawyers, "the names of things are, for avoiding confusion, diligently to be observed." The *amount;* the *duration;* and the *appropriation* for the payment of a judicial salary, are the three distinct points, which it is necessary, constantly, to bear in mind, while considering this subject. The *first* is partially regulated by the constitution; the *second* is specifically and exactly defined by it; and the *third* is at the discretion of the legislature; subject to cer-

tain qualifications, arising out of the constitutional provisions affecting the two first points.

The Declaration of Rights directs, that a salary *shall* be secured to the chancellor. A salary is a specified annual sum of money. The constitution is silent as to the *amount* of the sum thus directed to be secured; hence, the ascertaining and fixing that *amount*, necessarily, and is *expressly* devolved upon the legislature. It belongs, exclusively to the General Assembly to say what shall be the *amount* of the salary. But, along with this discretionary power, as to the *amount*, the Declaration of Rights has imposed an obligation, not only to give a salary, but to *secure* it. The manifest and necessary consequence of its being *secured*, is, that the *amount*, once specified, may be *increased*, but cannot be *diminished*. A salary, being a particular *amount* or sum of money, to be *secured*, must be so in every part and for the whole :—It must be preserved entire, without the least subtraction or diminution; otherwise, it cannot, in any sense, be said to be *secured*. But, a salary may be increased indefinitely; because no addition can, in any way, impair the security of any *amount* which had been previously given. Let us illustrate this by example.

The legislature, in 1785, secured to the chancellor a salary of *six hundred and fifty pounds*, and, in 1792, they increased his salary to *nine hundred and fifty pounds*, which they, in like manner, secured to him. Now, it is obvious, that the addition of the *three hundred pounds* necessarily left the *security* of the *six hundred and fifty pounds*, which had been previously given, wholly unimpaired; that salary was still, in every sense, *secure;* since it is certain, that the greater always includes the less. But suppose the salary given, in 1785, had been *nine hundred and fifty pounds;* and, in 1792, it had been reduced to *six hundred and fifty;* it is manifest, that such a *reduction* would have been a violation of the *security* of the salary of *nine hundred and fifty pounds*. Hence it is clear, that the legislature are under a constitutional obligation to give a salary; that it is perfectly discretionary with them to determine, *in the first instance; or, while the judicial office is vacant; or, when it shall become so;* what shall be the *amount* of the salary; and, that when they have determined the *amount*, they cannot render it *insecure* by withholding it altogether, or in any manner diminishing its value. The legislative discretion over the *amount* of the chancellor's salary is, thus, partially restricted and controlled. The

Assembly may fix it, at any *amount;* but, when fixed, although it may be increased; it cannot be, in any manner, *diminished*, to the prejudice of any chancellor, during the continuance of his commission.

This restriction, as to *duration*, which prevents the *diminution* of judicial salaries, if it were *indefinite*, might, possibly, become the means of accumulating the most serious burthens upon the State. But, it is not indefinite; it has been expressly limited to the period during which the officer holds his commission; which is, in effect and at most, no more than during the short period of the latter years of the life of a single individual. It is declared, that the salary of the chancellor shall be secured to him during the continuance of his commission. This restriction, upon the legislative authority, in this particular, is complete, absolute, and entire. No mere legislative act can either invigorate or enfeeble the force of this, or any other constitutional provision. The recital of the *thirtieth* article of the Declaration of Rights as in the act of 1785, ch. 27, may be considered as a declaration, that the legislature then acted in special obedience to the command of that article; but, it neither adds to, nor subtracts any thing from its force. It is the *article*, not the *act*, which binds every future legislature. The whole force of the restriction, upon the discretionary power of the General Assembly, in this particular, arises from the operation of the *constitutional provision;* not from any thing that can be said in a mere *legislative act.* It is very clear, therefore, that whatever expressions are to be found in any of the acts, relative to the *duration* of the chancellor's salary, are mere surplusage. Those laws are, so far, a mere dead letter; if they conform to the constitution, it is well; if not, they are absolutely void.

The third and last point relates to the *appropriation* or provision for the payment of judicial salaries. As to this, there are no two ideas more clear, or more easily understood than the contracting of a debt, and the making provision for its payment. This distinction, as regards the public, between the *obligation* by which a debt is secured; and the *appropriation* to pay it, is a practical one, which has been, from the very beginning, interwoven with all our fiscal concerns. During our revolution, the General Assembly were, in many instances, negligent of their *appropriations*, and made them too general and vague; but, at the close of the war, they were reminded of the importance of

having them distinct and specific, by the Intendant of the revenue, who said to them, in his report of the 14th of May, 1783, to the House of Delegates, that "as peace is now established, he begs leave humbly to suggest the propriety of *appropriating* all moneys in such manner, that the application and payment thereof cannot be mistaken by the treasurer." And, profiting by this intimation, the legislature, in one of their acts of that session, say, that "it is of singular consequence, that all and every *appropriation* should be executed agreeably to the order and intent of the General Assembly; and that the Assembly should be enabled, at each session, to judge of the state of said *appropriations*," &c. A multitude of instances might be adduced, from our statute book, of specific *appropriations* of particular funds, and of designated portions of the public moneys being applied to the payment of particular debts. The warm party controversies about *specific appropriations*, under the federal government, which once pervaded the Union, is within the recollection of every one.

But, as this distinction, between the *contract*, and the *appropriation*, has an important bearing upon the subject now under consideration; it is of "singular consequence," that it should be exemplified, illustrated, and fully understood, as regards judicial salaries. The General Assembly of November 1785, *secured* the chancellor's salary, according to the Declaration of Rights, during the continuance of his commission. And, in the before recited message of the Delegates to the Senate, of the 23d of January of that session, they say, "If time will permit, we shall attempt to provide particular funds to secure the payment of the salaries established by our bill;" that is, by the act of 1785, ch. 27. It appears, that after that bill became a law, which was on the 7th of February 1786, "leave was given to bring in a bill to provide, and *appropriate* a permanent fund for the payment of the salaries to the chancellor and judges." But, it seems, as had been expected, there was not time, during that session, to provide a fund, as was proposed; and the subject was not called up again. By the third section of the act of 1785, ch. 27, it was declared, that the salaries of the chancellor and judges should be paid "out of the surplus raised every year, *until the General Assembly shall make other provision for payment*." Thus, the constitutional obligation to pay the chancellor his salary, during the continuance of his commission, is, most clearly and distinctly, recognised by the acts of that session; and yet, the same enlightened legislators, no less

clearly and distinctly, claim, recognise, and reserve to the General Assembly a complete discretionary power over the *appropriation*, the mode of making provision for payment.

By the act of 1792, ch. 76, it is declared, that the chancellor's salary shall be paid to him "during the continuance of his commission." And, by the third section of the same act, it is declared, that to "secure the punctual payment of said salary," certain taxes on proceedings in chancery and in the land office should be levied and collected; and, if they should not bring into the treasury a sufficiency, "the deficiency should be made up out of any moneys in the treasury arising, or to arise from the sale of vacant lands." And then, by the fifth section, it is declared, that "the said taxes shall be collected and paid for *five years* after the end of the present session of Assembly, and *no longer*." This, then, is a clear instance of the express constitutional continuance of the salary, and the actual *limitation* of the fund, out of which it was to be paid; of a salary given during the continuance of the commission, and of a *temporary appropriation* for its payment.(*v*)

(*v*) This distinction between the duration of a judge's salary and an appropriation for its payment, is also strikingly exemplified by the last act of parliament passed in the year 1760, (1 *Geo.* 3, *c.* 23,) in relation to the commissions and salaries of the English judges; by which, after reciting, that the king had declared, that he looked upon the independency and uprightness of judges as essential to the impartial administration of justice, as one of the best securities to the rights and liberties of his subjects, and as most conducive to the honour of his crown; it was enacted, that the commissions of judges should continue in full force during their good behaviour notwithstanding the demise of the king; provided that it should be lawful for the king to remove any judge upon the address of both houses of parliament: And that such salaries as were settled upon judges by act of parliament, and also such as should be granted to them by the king should be paid to them so long as their commissions should remain in force. And then it was further enacted, "That such salaries of judges as are now or shall become payable out of the annual rent or sum granted for the support of his majesty's household, and of the honour and dignity of the crown, shall, from time to time, after the demise of his majesty, or any of his heirs and successors, be charged upon and paid and payable out of, such of the duties or revenues granted for the uses of the civil government of his majesty, his heirs and successors, as shall be subsisting after every such demise respectively, until some further or other provision be made by parliament for the expenses of civil government; and from and immediately after the making of such provision, and during the continuance thereof, such salaries shall be paid and payable out of all or any of the moneys which shall be applicable to such uses and expenses as aforesaid."

Lord Coke, in speaking of the court of exchequer, informs us, that "the chief baron is created by letters patent, and the office is granted to him *quamdiu se bene gesserit*, wherein he hath a more fixed estate (it being an estate for life,) than the justices of either bench, who have their offices but at will: and *quamdiu se bene gesserit* must be intended in matters concerning his office, and is no more than the

It may, therefore, be laid down, from the whole course of the government; and from these solemn and well considered acts of the legislature, as a firmly established constitutional principle, that the chancellor's salary is a debt due to him from the State; guaranteed, not by any *act of Assembly*, but by the *constitution*; the *appropriation* for the payment of which is to be made by the legislature; that is, the *amount* being fixed, it is to be paid, to use the words of the Declaration of Rights, "in such manner, and at such times as the legislature shall hereafter direct." Bearing in mind these three important, and settled distinctions, between the *amount*, the *duration*, and the *appropriation* for a judicial salary, let us now proceed cautiously to consider the act under which the present chancellor claims his salary.

The council proceedings will show, that on the sixteenth day of August, eighteen hundred and twenty-four, the present chancellor was *unanimously* appointed by the governor and council; and, that, on the eighteenth day of the same month, he took the oaths of office, had the great seal of the State delivered to his keeping, and entered upon the duties of his office. What was then the salary assigned to the chancellor, he contends does now, constitutionally, belong to him; on the ground, that whatever was then declared, by law, to be the *amount* of the chancellor's salary, was, by force and operation of the Declaration of Rights, *secured* to the chancellor, who then came into office, *during the continuance of his commission.*

The present chancellor claims his salary under and by virtue of the act of 1798, ch. 86, and the *thirtieth* article of the Declaration of Rights. This act of Assembly is entitled "A supplement to the act entitled an act for establishing and securing the salary of

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law would have implied, if the office had been granted for life. And in like manner are the rest of the barons of the exchequer constituted, and the patents of the attorney general and solicitor, are also *quamdiu se bene gesserit.*"—(4 *Inst.* 117.)

But notwithstanding what is here said by Coke, it would seem that any of these officers might have been removed at the pleasure of the king, without the institution of any judicial proceeding, or the interposition of parliament; for all the lawyers and historians of England speak of the constitutional independency of the judges as an improvement which was not finally established until the year 1700, long after the death of Coke, (*ante* 615, *note* (*h.*); 3 *Hal. Const. Hist. Eng.* 262; *Smollet's Hist. Eng. ch.* 6, 14, & 16.) It is most likely, that the provision of our original constitution, (art. 40,) which declares "that the chancellor, all judges, *the attorney general*, &c. shall hold their commissions during good behaviour," &c. was suggested by what is here said by Lord Coke; which provision as to the attorney general has, however, been since altered, 1816, *ch.* 247, confirmed by 1817, *ch.* 69.

the chancellor." And it is enacted, "that the chancellor shall be entitled to receive, for all duties and services whatever prescribed or to be prescribed by law, an annual salary of twelve hundred and seventy-five pounds current money, and no more, to be paid quarterly by the treasurer of the Western Shore." And then immediately follows the second section limiting the duration of the act in these words; "This act to continue and be in force till the twentieth day of October, eighteen hundred, and until the next session of Assembly which shall happen thereafter."

The limitation of this act operates so far, and so far only, as it is compatible with the Declaration of Rights. In so much as it contravenes the constitution, it is a nullity; but, in other respects, it may be allowed to operate according to the express or implied intention of the legislature. This act specifies the *amount* of the chancellor's salary; and, that *amount*, not by the act, *but by the Declaration of Rights*, is *secured* to the chancellor *during the continuance of his commission*. So far, then, the constitution expressly cuts off and prevents the operation of the limitation of the second section. But, upon other matters, this limitation may have its full effect. Upon the *general appropriation*, or authority to pay that *amount* out of any money in the treasury of the Western Shore, it may and does operate; because, as to the fund to be appropriated, and as to the *mode of making provision for payment*, the legislature has a discretionary power; and, as to that, they may make an express reservation of the right to *appropriate* at pleasure, as was done by the act of 1785; or, they may make a special, and, also a *limited appropriation*, as was done by the act of 1792. Because, as we have seen, the *amount*, and *duration* of the salary being wholly distinct from the *appropriation*, or "the provision for payment," as it is called by the act of 1785, the two first are *secured*, during the period specified by the constitution; and the other is at the *pleasure* of the legislature.

The three acts of 1785, of 1792, and of 1798, are, then, all of them in their objects, intentions, and principles precisely alike, in every particular. They, each of them, bestow upon the chancellor a specified *amount* of salary; which was, in each instance, by operation of the Declaration of Rights, *secured* to the chancellor *during the continuance of his commission;* and, in each instance, the legislature *reserved*, or expressly *exercised* a discretionary power over the *appropriation*, or "provision for payment." And these distinct ideas, in this train of thinking, were obviously, as the acts them-

selves prove, present to the minds of the legislature during the passage of each one of them.

The General Assembly of 1785, distinctly inform us, in every way, by their messages, by the acts which they proposed to pass, and by the act which they actually did pass into a law, that they could only fix the *amount* of the chancellor's salary; that when they had so fixed it, that *amount* was *secured* by operation of the Declaration of Rights; but, that the *appropriation* might be made in such manner as they thought proper; and, accordingly, they expressly declared, that their general appropriation should remain only until they "*make other provision for payment.*" The evidences as to the opinions of the General Assembly of 1792, are not so various and large; but, they are no less distinctly expressed in the act which they passed upon the subject. Their act recites, that the salary which they gave was secured by the constitution; and, then it asserts and exercises a discretionary power over the *appropriation*, by setting apart a particular fund, and *limiting* its continuance to five years, and *no longer.*

There is sufficiently unequivocal evidence, that the same distinct ideas were present to the minds of the General Assembly of 1798; and, that they too acted under the influence of the same opinions. Their act upon this subject is entitled, "*A supplement to the act*, entitled an act for establishing and securing the salary of the chancellor." Thus expressly referring to that law, in which all those ideas and distinctions, and all that train of thinking upon this subject, which had been so thoroughly discussed and considered, at the session of 1785, and reconsidered, and reaffirmed at the session of 1792, were strongly and clearly recalled, and placed before the minds of the legislators of 1798.

And why was this done? Why was the act of 1798 called "*A supplement*" to that of 1792? Why were the previous legislative acts thus referred to? Surely, it could not have been done for the purpose of bringing before the eyes of the legislators of 1798, an example of the prostration of any of the securities of good government. It certainly could not have been done, for the purpose of reading them a lesson, as to the mode, and the pretexts, and the expedients under which the constitution might be evaded or violated. It could not have been intended to read the most solemn recognitions of constitutional principles for the purpose of obliterating or smothering them. It would be monstrous to suppose, that any legislators would invoke, and place upon their

tables, the clearest evidences of the chancellor's constitutional independency, for the express purpose of prostrating it; and of making him the mere supple creature of either branch of the Assembly; and that too, not by a bold and open movement, which struck down his rights at a single blow; but, by the low and crawling contrivance of a temporary act; which, while it offered an ostensible extension of bounty, covertly and in reality bought out the chancellor's *independency*, the chief stay, the pride, and the only blessing of his high and laborious station. No such designs can, or ought to be imputed to the legislators of 1798.

On the contrary, those legislators could have had no other intention, in thus announcing their act as "*A supplement*" to that of 1792, than to assert, by the very first word they recorded upon the statute book, that they followed the example, and legislated under the same impressions, and according to the same principles, that their predecessors had done. They meant to say, that they adopted *the principles of the act of* 1792; that as that act conformed to the Declaration of Rights, in giving to the chancellor a salary during the continuance of his commission; so this, their act, should give him a salary for a similar duration. That as the act of 1792 had made only a *temporary* provision for the payment of the *amount* then given; so this, their act, should, in like manner, *temporarily* provide for the payment of that they gave. The act of 1792 gave the less, this the greater *amount;* the act of 1792 set apart a *particular fund* for payment; this act, in general terms, directs, that the *amount* given shall be "paid by the treasurer of the Western Shore." These are the points of *similarity* and of *difference* between these two acts. The latter is, then, in sense and substance, honestly and fairly "*A supplement*," to the former. It follows, therefore, that the present chancellor is now, and will be entitled, during the continuance of his commission, to demand and receive, annually, by virtue of this act of 1798, and of the *thirtieth* article of the Declaration of Rights, the sum of twelve hundred and seventy-five pounds current money.

These three distinct ideas of the *amount*, the *duration*, and the *provision for payment* of judicial salaries have been continually, under all circumstances, and on every change, carefully borne in mind by the representatives of the people of Maryland. After the alteration of the judicial system of this State, made by the act of 1804, ch. 55, was confirmed, the legislature passed the act of 1805, ch. 86, entitled "An act to establish permanent salaries for

the judges of the six judicial districts of this State." The preamble of which recites, that "whereas by the thirtieth section of the Declaration of Rights it is declared, that salaries liberal, but not profuse, ought to be secured to the judges during the continuance of their commissions." Hence, it appears, that the very same legislative body, who ratified that alteration of the constitution by which the present judicial system was established, gives us distinctly to understand, that no alteration whatever was made as to the *security*, or *duration* of judicial salaries; since they refer to the *original* article of the Declaration of Rights, as the foundation of that *security* and *duration*. And they thus, implicitly, but strongly, give us to understand, that they chose rather to recur to first principles, and to rest judicial independency upon the more broad and firmly established doctrine of 1776, than upon any provision contained in the amendment they had so recently adopted; and by which it was declared, that "the salaries of the said judges shall not be diminished during the period of their continuance in office." But it is remarkable, that in the enacting clauses of this act, there is not one syllable, indicating, in any way, either the *security*, or the *duration* of the salaries given. In the first clause, the annual amount only, and nothing more, is specified. After which, in a separate clause, it is declared, that "the treasurer of the Western Shore shall be and he is hereby authorized and directed, to pay quarterly, out of any unappropriated money which may be in the treasury, to each of the said chief judges and to each of the said associate judges, or his order, the salary which he is entitled to receive by law."

The sense and understanding of the legislature, as expressed by this act, deserve particular attention. By the preamble which may sometimes be called in to clear away an ambiguity, but cannot in any case be allowed to control the enacting clauses of a law; the section of the Declaration of Rights, in obedience to which the act was made, is referred to in general terms; but, the enacting clauses of the law use none of its expressions, nor do they adopt or deny any of its principles. The act merely designates the *amount* of the salaries; and then makes a general *appropriation* out of which the treasurer of the Western Shore is directed to pay quarterly. Whence, then, is derived the *security*, and *specific duration* of these judicial salaries? The preamble of this act correctly recites the sense and substance of what is required by the Declaration of Rights; but, it does not itself require, command,

or enact any thing. And, in the enacting clauses, there is not one word which expresses or suggests a single idea upon the subject of their *security* or *duration*. But read the law, and the *thirtieth section* of the Declaration of Rights together, and there is no room for any doubt whatever. The *amount*, specified by the *law*, is *secured*, by the *constitution*, to each judge, during the continuance of his commission. So, there is nothing in any part of the law itself, that declares, or from which it may be inferred, that it cannot be repealed or altered at the pleasure of any succeeding legislature. But, the nature and character of the subject, for which it provides, inevitably and necessarily carries us to the constitution, where we find that positive, mandatory clause, which prohibits the withholding or diminishing of the salaries of the judges during the continuance of their commissions.

The security of these judicial salaries, given by this act of 1805, ch. 86, therefore, is expressly rested upon exactly the same basis, which sustains the salary given to the chancellor, by the act of 1798. The only difference between the two acts, is as to the manner in which the foundation of their security and duration is referred to. The preamble of the act of 1805 leads us to the foundation of the security and duration of the judges' salaries, by a direct reference to the Declaration of Rights. The act of 1798, in a different manner, but, with equal certainty, leads us to the same immovable basis, whereon we find the *security* and *duration* of the chancellor's salary reposes. The act of 1805 makes a *general appropriation*, and directs the treasurer of the Western Shore to pay quarterly. But, as to this, these salaries might have been made payable, as by the act of 1792, out of a special fund, to be collected from taxes on proceedings at law or the like; or the appropriation, whether general or special, might have been limited to five years, as by the act of 1792, or to two years, as by the act of 1798, or even from year to year, as by the several acts continuing the act of 1798, passed since the year 1805. There is then, in point of principle, when taken in connection with the Declaration of Rights, no difference whatever between any two of these laws relative to judicial salaries. They are all, alike, controlled by the constitution, which specifies the *security* and *duration* of judicial salaries; and, in each the *appropriation* is suited to the occasion, to the convenience of the State, or to the then opinion of the General Assembly.

It may, probably, be said, that the suffering of the act of 1798

to expire, or, by the refusal of the legislature to continue it, the act of 1792 was virtually revived and again in force. There is not one syllable to be found recorded in the votes and proceedings, of the last session of either branch of the General Assembly, going to show, that such was the understanding and belief of the legislature. But, supposing such to have been their opinion, the position is not correct, even on common law principles; and is utterly untenable according to our constitution. It is an established rule of the common law, that by the repeal of a repealing statute, the original act is virtually revived. But, that is not the case now under consideration. It is this: The statute of 1798 professes to repeal the prior act of 1792, by substituting other provisions, as to the whole subject, for which that act had provided: and, then the act of 1798 is, in general terms, limited to two years. Now, in such case, it has been adjudged, that the prior act does not revive after the repealing act is spent; unless the intention of the legislature, to that effect, be *expressed.* In this instance no such intention has been expressed; and, consequently, *upon common law principles*, neither of those acts are now in force; and our statute book presents an entire blank so far as regards the chancellor's salary.(*w*)

But, let it be conceded for a moment, and by way of argument, that the effect of discontinuing or suffering the act of 1798 to expire, would be, that the act of 1792 would be revived.—It certainly will not be contended, that the effect of this *constructive revival* of the act of 1792 would be a complete revival of the whole of it, including all such clauses as had been repealed or altered by any perpetual and now subsisting law. By a virtual revival of a law nothing more has been ever understood to be thus revived, than that which would have continued in force, had it not been for the law, which was repealed or had expired. This is the principle of a constructive revival, it goes no further. Now let us

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(*w*) Warren *v.* Wendle, 3 East, 205; The King *v.* Rogers, 10 East, 569.

1765, ch. 33, note, *per* HANSON, *Chancellor.*—It may be necessary to remark, that the repealing clause of this act, notwithstanding its expiration, is still in force. There is an evident and material distinction between a temporary act containing a repealing clause, which act is suffered to expire, and an act made for the purpose of repealing another act, which is afterwards itself repealed. In the first case, the legislature declares its intention, that an act be done away and rendered void, and there is no proceeding of the legislature afterwards to restore life to the act repealed. In the second case, the legislature expresses the same intention, but afterwards by doing away and rendering void the repealing act, its intention cannot be construed otherwise than to give new life to the act repealed.—(*Hanson's Laws of Maryland.*)

inquire, and endeavour to ascertain, on how much of the act of 1792 a *constructive revival* would, at this time, operate.

The two first sections of the act of 1792, specify the *amount* and *duration* of the chancellor's salary; but, they make no provision whatever for its payment. By the four last sections a particular fund was to be raised, *for that purpose*, from taxes on proceedings in chancery and the land office. From that fund, the treasurer was directed to pay the chancellor's salary, if it should be adequate; if not, the deficiency was to be made up, not generally out of any money in the treasury; but "out of any moneys in the treasury arising or to arise from the sale of vacant land"—and, it was declared, that "the said taxes shall be collected and paid for five years after the end of the present session of Assembly and no longer." By the act of 1797, ch. 51, every part of this act "relative to the said taxes and duties," was continued during the term of seven years, and until the end of the next session of Assembly; and by the act of 1804, ch. 108, "the fifth section" of the act of 1792, ch. 76, was "enacted into a permanent law;" provided "that it should be subject to any alterations which have been made therein since the passage of it." But by the act of 1804, ch. 64, passed previous to the last mentioned act of the same session, a new mode is prescribed of collecting the taxes imposed by the act of 1792, ch. 76; and, the several sheriffs are directed to collect, "and to pay the same to *the treasurers of the respective Shores*, as the case may be." By virtue of which law, those taxes, when paid to the *treasurers of the respective Shores*, immediately become a part of the *general funds* of the State; and are not now, as formerly, paid to the treasurer of *the Western Shore only*, and by him kept "*apart from all other money to be applied towards the payment of the salary of the chancellor.*"

These taxes on proceedings in chancery and the land office, *of the Eastern Shore*, are, therefore, now paid to the treasurer of *that* Shore; who, after making sundry disbursements, pays the annual *general balance* to the treasurer of the Western Shore—so that the treasurer of the *Western Shore* has, now, no means of ascertaining the amount of the whole fund which had been created by the act of 1792; since the two treasurers are as wholly distinct, in regard to their accounts, disbursements, and responsibility, as if they belonged to different governments. The treasurer of *the Western Shore* cannot, now, ascertain what deficiency he should make up out of money arising from the sale of vacant land; and, conse-

quently, has been virtually deprived of the authority to pay the chancellor's salary out of that particular fund, as was prescribed by the act of 1792. This *special fund*, created by the act of 1792, for the payment of the chancellor's salary, has, then, been totally broken up, abrogated and abolished; because, the moneys arising from the taxes, imposed by that act, have been permanently diverted from their original destination, by a *perpetual* law which mingles them with the *general mass*, and subjects them indiscriminately to the *general demands* upon the treasury. There has been no law passed since 1792, authorizing either of the treasurers of the State to pay to the chancellor, in any other manner, the amount of the salary given him by that act.

Hence, it follows, that if it were even admitted, as it cannot be, that the act of 1792 would be *virtually revived* by the expiration of the act of 1798, there is nothing now left, of the act of 1792, on which a mere *constructive revival* can operate, but those parts of it which *fix the amount* of the chancellor's salary; because, the residue of it, which created a fund out of which the salary was directed to be paid, has been altered, and the fund otherwise applied by subsisting perpetual laws. The *appropriation* to pay, under the act of 1792, having been thus altered and repealed, the chancellor, it is evident, can be in no better situation, as matters now stand, under the act of 1792, than under the act of 1798. He would be alike without any legislative warrant to demand payment of the sum specified by either of those acts as the amount of the chancellor's salary.

But, it may be said, that this discretionary power, as to *appropriations* for the payment of judicial salaries, virtually gives to the legislature a control over the whole subject. To a certain degree, this must be admitted. Legislators are under an *imperfect*, not a *perfect* obligation to make appropriations for the payment of such salaries; or in other words, they are *morally* and *religiously* obliged to obey the constitution. They are *morally* bound by their duty to their country; and they are *religiously* bound by their *promissory oaths*, which they take before they can be admitted to their seats. But, the obligation, thus imposed upon them, is not a *perfect one;* because, they cannot be personally coerced by any superior power, as by a court of justice, to comply with that obligation. Legislators, who violate the constitution, may incur the displeasure of the people; they may feel their moral dignity somewhat lessened and disturbed; and they may have some very annoying and compunctious visitings of conscience. But the force of the *imperfect* obligation, im-

posed upon them, will end there. The injured citizen may complain, but he can do no more than complain; he will be without redress.

The salary claimed by the present chancellor is a debt due to him from the State. The law of 1798 has ascertained its *amount*, and the Declaration of Rights has declared it shall be *secured* to him; and further, that it shall be *secured* to him *during the continuance of his commission*. It is a debt due to him from the State, and continually growing due to him, during that period of time—and the State is as much bound to pay that debt, in one form or other, as it can be bound to pay any debt whatever. The State cannot now be sued; nor could its property, like that of a tardy or a fraudulent debtor, at any time be taken and sold to pay its debts. The legislature have the strength, the physical power to disregard the constitution; to wrong an individual; to refuse to appropriate money to pay a debt; to refuse to make provision for the payment of a salary. But, to do so is contrary to, and a violation of their *moral*, their *religious*, and their *constitutional* obligation.

Each legislator has, like every other citizen, a deep interest in the preservation of the constitution in all its perfection and integrity. Institutions, that cease to command respect, are soon treated with contempt, and become exposed to the assaults of every rude intruder—one violation sanctions another; and every breach, however small, weakens the political edifice; one constitutional pillar after another may be loosened from its base until all are tumbled into ruins. That which is now the case of the chancellor may soon become the case of every judge in the State. From one department ruin may be visited upon another, until all the divisions of the government are removed, and every check and balance, intended to guard and protect the rights of persons and of property, against the wayward and inordinate passions and designs of the few, shall be wholly destroyed.

The House of Delegates are the peculiar guardians of the treasury of the State. They alone appoint the treasurer, who holds his office at their pleasure. Hence it is obvious, that any person or officer, whom they may order their treasurer not to pay, will not be paid; no matter who he may be, or what may be the merits of his claim. In such case, the Delegates need not resort to any expedient or indirect movement to attain their object. It is only necessary, that they should boldly and firmly give the order: and, if their treasurer hesitates, the same majority who gave the order, can at once remove him and appoint a more subservient

officer.(x) If a *House of Delegates*, capriciously, and without any just cause, were to refuse to make the necessary appropriation for the payment of the salary of the chancellor or a judge; the neglect, or the wrong might be corrected in the course of one year, or by the next election; but if *the Senate*, at the commencement of *their* term, were, in like manner, to refuse their assent to the making, renewing, or continuing a provision for the payment of a judicial salary; the officer must either resign or remain unpaid for *five years*, before it would be in the power, even of the people, to correct the procedure.

All the judges under the federal government are precisely in the same predicament, in relation to Congress, that the chancellor of Maryland is, in relation to the General Assembly of the State, under the act of 1798. None of the various acts of Congress, which ascertain and fix the salaries of the judges of the United States, in the acts themselves, make any *appropriation of money* for the payment of those salaries. The appropriation, for that purpose, is always made by separate laws; and is uniformly included, as one of the distinct items, in the annual appropriation acts passed by Congress.(y) Hence,

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(x) "The executive, in our governments (said Mr. Jefferson in March 1789,) is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period. I know there are some among us, who would now establish a monarchy. But they are inconsiderable in number and weight of character. The rising race are all republicans."—(2 *Jeff. Corr. Let.* 191; *Coop. Just.* 438.)

By the act of 1824, ch. 125, the treasurer of the Western Shore was authorized to pay over annually to the managers of the Washington monument lottery, all the surplus that should be received from the State lotteries over and above the net sum of twelve thousand dollars, until the debts then due should be paid and the monument completed; provided that the managers should relinquish their right to draw any lottery under the authority previously granted to them. The relinquishment was accordingly made as required. After which the propriety of continuing this adjustment or contract with the managers being under the consideration of the General Assembly, and before they had come to any determination upon the subject, the House of Delegates *alone*, passed the following order:

"*Ordered*, That the treasurer of the Western Shore be and he hereby is required to withhold payment under the act of December session 1824, chapter 125, during the continuance of the present session of Assembly."—(*Jour. House Del. 8th February*, 1827.)

But perhaps not feeling altogether confident of the propriety of this order, on the next day a *joint resolution* in the same words was passed and sent to the Senate for their assent. The matter seems to have been afterwards adjusted, for nothing further appears to have been done in this way.

(y) Take for example the act of Congress of the 23d September 1789, ch. 18, which, without any reference to the constitution or to the continuance of the judicial salaries, merely declares, after specifying the amount to each, that the allowance to

either the Senate or the House of Representatives, might, at once, stop the salary of all the judges, or of any one of them, by refusing their assent to the whole or any part of that annual appropriation. And, consequently, all or any of those judges, might thus, by the negative of one branch, be deprived of his salary. The *appropriation*, for the payment of the chancellor's salary, under the act of 1798, had been made or renewed from time to time for twenty-four years previous to its being stopped by the sole negative of the House of Delegates, on the 26th day of February last. Is there any thing to prevent that from being done by one branch of the legislature of the Union, which has, thus, actually been done by one branch of the General Assembly of Maryland? It is impossible to draw a distinction between these two cases of the federal judges, and the State chancellor. They are exactly parallel and strongly illustrative of each other. Both of them, alike, conclusively show, that it is no less unconstitutional to withhold, or to diminish a judicial salary, by suffering a law to expire, than by an absolute and direct repeal of a legislative act. If the treasurer of Maryland conceives, as it appears he does, that the *appropriation* for the payment of the chancellor's salary, made by the act of 1798, has been discontinued, or suffered to expire; the two branches, and every member of the General Assembly are constitutionally bound to revive and renew the *appropriation* for that purpose, in some form or other.

There is, as we have seen, nothing to be found recorded in the votes and proceedings of the last session, which show, that it was the understanding and belief of either branch of the Assembly, that the act of 1792 was a permanent act, one which could not be constitutionally repealed, during the continuance of the chancellor's commission; and, that the act of 1798 was altogether temporary in its character, and might therefore be suffered to expire. But, let it be conceded, that such was the understanding of the Delegates. If this position is correctly understood, it amounts to no more than this: Where a salary is given to the chancellor by a law, which is not limited in duration, it cannot be constitutionally *repealed* for the purpose of diminishing that salary. If this be the position claimed by the Delegates, every

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the several judges shall commence from their respective appointments, and be paid at the treasury quarterly; and the act of the 14th of March 1794, ch. 6, which declares, that there be appropriated for the compensations granted by law to the chief justice, associate judges, district judges, and attorney general, forty-three thousand two hundred dollars.

thing for which the chancellor and Senate contend, is admitted. But it seems, there is a nice distinction between the *repealing of a law*, and the suffering of a law to *expire*. What is it? Does it amount to any thing more than a distinction between an act of *commission*, and an act of *omission*? The law, having declared the *amount* of the chancellor's salary, the legislature cannot constitutionally diminish it by *repealing* that law; but they may do so by suffering it to *expire*:—that is, the legislature *commit* a violation of the constitution, if they do pass an act to *diminish* the salary; but if they *diminish* it by *omitting* to pass an act, they do not violate the constitution. This opinion, then, can have no other foundation, than the distinction between an act of *commission* and *omission*. Let us examine it.

The great object of the constitution is judicial independency; and, therefore, it is commanded by the Declaration of Rights, that the chancellor's salary shall be secured to him during the continuance of his commission. The *mode* of obeying this command is a matter of no importance; and therefore, the *mode* is submitted entirely to the discretion of the legislature. But any act, either of *commission* or of *omission*, which disobeys this command, and which prevents the attainment of the object contemplated, is alike a violation of the constitution. Suppose the legislature should, by an act, without making any provision whatever for payment, fix the *amount* of the salary of the chancellor; and then, by another act, provide a fund for its payment; and, afterwards, were to *repeal* the latter act, without making any other provision for payment. It is presumed, that no one could hesitate in pronouncing such conduct a gross violation of the constitution. Then suppose, the act, making provision for payment, were limited to two years; and the assembly were to *neglect* to continue it, or to make any other provision for payment; such legislative *omission*, would have precisely the same effect as the act of *commission*; and, therefore, the violation of the constitution would be no less palpable. The salary of the chancellor is to be secured to him; that is, it shall not, at any time, on *purpose*, or by *neglect*, be withheld or diminished, during the continuance of his commission. This, the constitution has declared, shall not be *directly* and *purposely* done by the General Assembly; and surely, what is prohibited, and, therefore, cannot be *directly* done, can never be accomplished by any *contrivance* or indirect movement; and it would be hopeless to attempt to maintain, that what cannot be

constitutionally effected by the whole General Assembly, may nevertheless be fairly brought about by either the Senate, or the House of Delegates alone.

There is *a consistency* and *a harmony* in our constitution, which can, in no respect, be disturbed without being productive of some pernicious consequences. The several parts, and the whole together, have been, and are still further susceptible of being amended, improved, and re-invigorated; but, the collision of one part against another, has never failed to be attended with the most serious mischief. The breaking of a single chord produces the harshest dissonance throughout. The Declaration of Rights declares, "that the legislative, executive, and judicial powers of government ought to be for ever separate and distinct from each other." This division and separation is the peculiar characteristic and *great excellence* of our government. It is the grand bulwark of all our rights, and every citizen has the deepest interest in its most sacred preservation. Each of these several departments should be kept, and should feel it to be its highest honour, to keep strictly within the constitutional boundaries assigned to it. The legislature should not encroach upon the judiciary, nor upon the executive; nor should either of those departments trench upon each other, or upon the legislative.

Commissions during good behaviour, and salaries secured during the continuance of those commissions, constitute that strong well marked boundary between the judiciary and the other two departments. Thus founded and sustained, the judges are, and can be—and without it they cannot be—a firm, efficient, co-ordinate check and balance in the government. It is this independency of character, that enables the judiciary to shield the citizen against unconstitutional legislation; and against unwarranted wrong and violence from the wealthy and the influential.

But, it would be a mockery to expect of judges who are dependent upon legislators for their continuance in office, perhaps for their bread, a firmness and independency necessary for such purposes. No judge, thus dependent, would have the boldness to thwart a House of Delegates in their most ill-advised and wanton sports with the constitution. The sage declaration of the patriots of 1776, "That all *persons* invested with the *legislative* or *executive* powers of government are the *trustees of the public*, and as such accountable for their conduct," would be smothered or forgotten. The Senators would not dare to consider *themselves* as a co-ordi-

nate branch of the General Assembly; as "trustees of the public." They would learn, with suitable and becoming modesty, without opposition or inquiry, to register the edicts of the "immediate representatives of the people;" and the judges, holding their *commissions only* during good behaviour, would be taught to rely more on the extent, and the power of their family connections, and the number of their friends among "the immediate representatives of the people," than upon their temperate habits and honourable deportment; upon the skill and diligence with which they discharged their official duties; and upon the constitutional safeguards with which they were surrounded.

Legislative assumptions of *original* or *appellate judicial power* would be applauded as commendable efforts to reach the justice of the case; poetical imaginations would be taken for historical facts; and the most incoherent verbiage, respecting the true intent and meaning of the great charter of our rights, would be contemplated with approbation, as eloquent commentaries, founded in the soundest sense and the closest logic. Contracts might be impaired; individual rights might be legislated away, from haste, from mere ignorance, or a worse cause. And it would be in vain for the citizen to seek, or to expect justice, from a dependent, interested, and intimidated judiciary. The theories of our constitution might remain; but, in practice, its principles would be destroyed. The judges of our republic would not, as under the colonial establishment, be reduced to a subserviency to a foreign king; they would not be subjected to precisely the same kind of corrupting judicial dependence, so strongly denounced by the sages of the revolution; but in principle, the subserviency to which they would be subjected, would be the same: and in practice, no less pernicious and absolutely hostile to the temper and spirit of our constitution. Our government would, in a short time, cease to be a government of *divisions*, and *restrictions* of power; of *checks* and *balances;* and, losing every other feature, would become, at once, a government consisting altogether of a House of Delegates elected annually.

But, there is not, nor there cannot be, any just foundation for these painful forebodings, these gloomy anticipations. The aberrations of the day are not proofs of the waywardness of the times; nor is the conduct of a house, characteristic of a branch of the General Assembly of the State. The people of Maryland are not unmindful of the principles of their fathers. There is a mass of integrity and sound sense among them which no "trustee of the

public" can elude, or will dare openly to defy and insult. The people constitute that august *American tribunal*, in the last resort, before which every case may be brought, and whose final determination is altogether irresistible.

This interference with the *duration* of judicial salaries has another obvious and direct tendency, no less hostile to the principles of our constitution. The *appointing power* is lodged, exclusively, with the governor and council. But, if the General Assembly can, at pleasure, withhold or reduce a judicial salary, it is evident they may, in that manner, come into direct collision with the *appointing power* of the executive. If the person, appointed to a judicial office, happens to be displeasing to the legislature, his salary may be, at once, withdrawn or reduced so as to force him to resign. And what is most odious, in this kind of collision, is, that this unjustly excited and misguided feeling of the legislative body may be aroused by persons who are not members of it; by persons who are not of either house; but, who have influence and a knack at intrigue. Such malcontents may work upon the honest indolence of members, and urge them on, unthinkingly, to effect the ruin of the best of men, and the most sacred of institutions, merely to gratify some smuggled and vile malignancy, which they dare not have the impudence to exhibit openly before the public.

The executive alone are responsible for the appointments they make; and the legislature have no right, and ought not to interfere in any way whatever. They have no right to look beyond the *official behaviour* of those *in office*. It is their constitutional right to inquire whether a public officer behaves himself well or not; and, if he does not, to proceed against him. Let legislators *now* put the question to their constituents, to any competent and credible witnesses. Has the chancellor, have the judges discharged their several duties as they ought, as was required of them by the law and the constitution; have they behaved themselves well? If they have not, it is the solemn and sacred duty of legislators, from which, according to the principles of the constitution, they ought not to shrink, to call the alleged delinquent before them to answer for his conduct; and, on finding the charges against him sustained, to remove him from office. But, beyond this, the General Assembly have no right to go. In all other respects, the chancellor and judges are independent of legislators, and legislators of them.

From what has been said it appears, *First*, That the House of Delegates, of the last session, assumed the power to *reduce* the

chancellor's salary at pleasure, which was opposed by the Senate, as far as it was in their power; on the ground, that it could not be, in any manner, constitutionally diminished during the continuance of his commission.

Second, That the provision, requiring the salaries of the chancellor and judges to be *secured* to them *during the continuance of their commissions*, was suggested to the American people by the great national controversy, which terminated in their independence, as a necessary safeguard of their rights; and, after more than ten years consideration, was carefully inserted in the Declaration of Rights of Maryland.

Third, That the *thirtieth* article of the Declaration of Rights is, in every particular, clear and unambiguous; in all respects much more so than the corresponding English statute of the year 1700; and this article positively obliges the legislature to *give* a salary to the chancellor, and to *secure* it to him *during* the continuance of his commission, without *diminution.*

Fourth, That, owing to the revolutionary war, and the pecuniary and fiscal embarrassments of the State, during the first nine years after the establishment of the Republic, no salaries, of any kind, could be regularly paid; and, therefore, no salary was constitutionally secured to the chancellor during that time.

Fifth, That, during that time, the General Assembly repeatedly and solemnly alleged the *inability* of the State, as the *sole and only* reason why they did not *secure* to the chancellor a salary as they were required to do by the constitution.

Sixth, That the chancellor's salary, from the November session of 1785, to December session 1824, has been several times added to and increased; but never, in the least, or in any way, diminished, or attempted to be diminished.

Seventh, That the distinction between the constitutional *salary* of the chancellor, and the *compensation*, which was, for many years, given to him as *judge of the land office*, is clear; and one, that has been always well understood. The one must be, and is *secured during the continuance of his commission;* but the other had been given *during the pleasure of the legislature.*

Eighth, That the act of 1798, ch. 86, is not an ordinary act of legislation; but, is one which must be controlled, and is continued by force and operation of the *thirtieth* article of the Declaration of Rights.

Ninth, That the distinction between the *amount*, the *duration*, and the *appropriation* for the payment of the chancellor's salary is

clear; and one, which has been continually acted upon and is well established.

Tenth, That the act of 1798, ch. 86, by referring to all those antecedent acts and laws which recognise this distinction, between the *amount*, the *duration*, and the *appropriation* for the payment of a salary, is manifestly predicated upon it. And, therefore, it was clearly understood and intended, that it would and should be continued in full force, as to the *amount* of the salary, by operation of the Declaration of Rights; and, that the *appropriation* for payment *only* would require to be continued or provided for in the same, or in some other way.

Eleventh, That on the discontinuing or suffering the act of 1798, ch. 86, to expire, the virtual revival of the act of 1792, ch. 76, would not follow, as a necessary consequence, even according to the common law, much less according to the constitution.

Twelfth, That the *appropriation* or provision for the payment of the chancellor's salary, made by the act of 1792, ch. 76, having been *repealed* by a perpetual law, even if all other parts of it were permitted virtually to revive, no salary could be now paid to the chancellor under it.

Thirteenth, That the legislature are under a moral, a religious, and a constitutional obligation to make a regular appropriation, either general or special, for the payment of the chancellor's salary, as designated by the act of 1798, ch. 86.

Fourteenth, That the *harmony of the constitution* would be destroyed, by withholding or diminishing the chancellor's salary; the three departments brought into collision; and the Delegates would finally become triumphant over all.

Fifteenth, That the *appointing power* might be virtually annihilated, by this mode of withholding or diminishing the salary of the chancellor, or a judge.

From all which, it clearly follows, that the present chancellor was, and is now constitutionally and legally entitled to ask, demand, and receive of the State of Maryland, a salary of *twelve hundred and seventy-five pounds*, current money, during the continuance of his commission.

Under this firm conviction, after the sixteenth day of May last, when the first quarter of his salary became due, after the end of the last session of the General Assembly, the chancellor drew a draft for *eight hundred and fifty dollars*, the amount thereof, on the treasurer of the Western Shore, in favour of the cashier of the

Farmers Bank of Maryland, in the same manner in which he had obtained payment of the previous quarter of his salary. This draft the treasurer refused to pay; giving for answer, that "*as the General Assembly, at its last session, refused to continue the law of* 1798, *or the act of* 1797, *which gave to the chancellor an increase of salary, I am not authorized to pay this order; or, on account of his salary, more than is allowed by the act of* 1792, *to wit:—at the rate of* £950 *per annum.*" From which it appears, that the treasurer either construed the law for himself, or followed that which he supposed to be the construction given to the law and the constitution by the House of Delegates. After the 16th day of August last, the chancellor drew another draft, in the same manner, for the payment of the quarter of his salary, which became due on *that* day, which was, in like manner, rejected. And, after the 16th day of November last, the chancellor had a third draft presented to the treasurer, for a third quarter of his salary, which had *then* become due, the payment of which was refused, in the same manner, and for the same reasons.

To have accepted the *amount*, which the treasurer proposed to pay, under the act of 1792, ch. 76, would have been a total abandonment of the ground taken by the Senate; and it might have been construed into a clear admission by the chancellor, that the House of Delegates, or the legislature could, constitutionally, *diminish* the chancellor's salary at *their pleasure*. Such an abandonment he could not make—and he felt himself *forbidden* from making any such admissions. He deemed it a sacred respect he owed to the Senate, a co-ordinate branch of the "trustees of the public," not to abandon the ground *they* had taken in his behalf; and, he held it to be a proper regard to *himself*, and a solemn *duty* he owed to the *constitution*, not to make any such admissions; or to suffer any act of *his* to influence or embarrass the consideration or determination of this, the most important question, that has ever yet been presented to the General Assembly of Maryland.

It is not in chancery as at common law, where the court's *docket* exhibits a complete list, and a full account of all its business. A court of chancery does not, like a court of law, move forward all its business from term to term, from stage to stage, and periodically; it is continually open; always accessible; and may be, at any time, engaged in business; it has no recesses, no resting places. There are many cases in chancery, which, although soon brought to a termination, in relation to the immediate object for which they were instituted; yet, as to other purposes may be

opened and reopened; and, from the nature of things, and to answer the purposes of justice, must be kept open and depending for many years. The adjustments under the late Spanish treaty called up, and recently gave rise to much litigation, in cases that had slumbered for nearly *thirty* years; and, in which the parties, or their survivors had been dispersed over half the Union.

The labours of the chancellor are not, like those of a judge of a court of common law, spread out and displayed before the public, by calling in witnesses and jurymen to be present and to partake in them. The whole weight of *his* duties fall upon himself, and upon himself alone. The anomalies and the intricacies in the administration of justice are poured out upon him; and he is left unaided and alone to ascertain the course which justice requires to be pursued, according to the established principles of equity as they arise out of the complicated facts of each case. The chancery is the great *property court* of the State. And a vast proportion of the individual rights to the soil of Maryland are only to be found in that court. Perhaps, it would not be hazarding too bold an assertion to say, that one half of all the titles to lands in Maryland, when traced from the present holder to their origin, will be found to have some one or other of the links, in the chain of title, resting in the court of chancery.(z)

It would be foreign to the constitutional question, now under consideration; and it would be invidious to contrast the duties of the chancellor with those of any common law judge in the State. But, there are those, who mistake the object of the act of November 1809, ch. 181, requiring the number of days each judge of the several courts of law, attends in their respective courts, to be certified annually to the General Assembly; and, under that mistake, they have taken up an opinion, that judicial labour was a sort of *job work*, the value of which might be estimated by the number of days the labourer was employed. To those, it may be satisfactory to learn, that the business of the court of chancery has latterly very much increased, and continues to increase; and, that its records will show, that the present chancellor has, either in the way of a formal session of a court, or otherwise, been called upon about three hundred different days of the last year, to transact business which had been brought before him from almost all the different counties of the State.

(z) It has been said, that most of the estates in England, once in thirty years, pass through the Court of Chancery.—(16 *Howell's State Tri.* 417.)

It is because of the continual calls to which a chancellor must always hold himself accessible, and because of the nature, and the peculiarly heavy pressure of the duties imposed upon such an officer, that the salary of the chancellor of England, and of every State in this Union, has always been double, or at least one-third more than that of any other judicial officer. And it is for the same reasons, that the salary of the chancellor of Maryland, from the first settlement of the country, up to this time, has always been in a similar proportion *higher* than that of any other judicial officer of the State.(*a*)

(*a*) The following table presents at one view the annual amount of all judicial salaries in Maryland, from the year 1773, to the year 1825 inclusive, translating those formerly given in the money of account of the State into dollars and cents.

	The time.	By whom and how given.	The Chancellor as such.	The Chancellor as judge of land office.	The Judge of Admiralty.	County Courts. Chief Judge.	County Courts. Associate Judges	General Court. Chief Judge.	General Court. Judge.	Court of Appeals.
Provincial.	1773.	By the Lord Proprietary during pleasure, as Governor £2666.66, and to the same person as Chancellor in fees. Votes & Pro. H. Del. Dec. 21 1779; 7 Mass. His. So. 202.	1866.66	——	in fees 266.66	Justic the p no	es of eace pay.	1866.66	1600.00	533.33
Revolutionary and unsettled.	1777	Resolution 14th April, 1777	800.00	——	No Judge	Justic	es of	£4 pe	r day.	No
	1778	Resolution 12th December, 1777	2000.00	——	800.00	the p	eace	same	same	Judges
	1779	Resolution 8th December, 1778	3333.33	——	1200.00	no	pay.	2986.66	2500.00	1333.33
		And by a Resolution of 29th December, 1779, as a compensation for this year	2333.33	——	1800.00	——	——	3749·33	——	——
	1780	Resolution 24th December, 1779	3333.33	——	8000.00	——	——	2400.00	2400.00	8000.00
	1781	Resolution 31 January, 1781	1600.00	——	533.33	——	——	1333.33	1333.33	533.33
	1782	Civil list act 1781 ch. 29 . .	2000.00	——	same	——	——	same	same	same
	1783	Civil list act 1782 ch. 28 . .	1600.00	——	same	——	——	same	same	same
	1784	Civil list act 1783 ch. 31 . .	same	——	same	——	——	same	same	same
	1785	Civil list act 1784 ch. 68 . .	1733.33	——	666.66	——	——	same	same	same
Secured by the Declaration of Rights and the Constitution.	1786	By 1785, ch. 27 and 71 . . .	1733.33	533.33	666.66	——	——	1600.00	1333.33	533.33
	1787 to 1792	By 1785, ch. 27; 1786, ch. 41; 1787, ch. 6; 1788, ch. 41; 1789, ch. 49; 1790, ch. 52; 1791, ch. 74; and 1790, ch. 33; in Districts of Counties . .	same	266.66	same	1066.66	£2.66 a day	same	same	same
	1793 to'96	By 1785, ch. 27; 1790, ch. 33; and 1792, ch. 76	2533.33	——	From this court an appeal could only be taken to the court established by congress, art. could art. 9. But it was virtually abolished by the present constitution, 3 H. & McH. 169.	same	same	same	same	same
	1797	By 1785, ch. 27; 1792, ch. 76; Resolution November 1796 and 1796, ch. 43	2733.33	——		1200.00	£3.00 a day	1300.00	1533.33	same
	1798	By 1785, ch. 27; 1796, ch. 76; 1797, ch. 71, 59 and 79; to the Chief Judge of the third or Baltimore District by 1797, ch. 69, £1400 . . .	2933.33	——		1300.00	same	2266.66	2000.00	833.33
	1799	By 1785, ch. 27; 1797, ch. 50, 69 and 79; and 1798, ch. 86	3400.00	——		same	same	same	same	same
	1800 to 1805	By 1797, ch. 50 and 69; 1798, ch. 86; 1799, ch. 52; and 1801, ch. 74, s. 18	same	——		same	£4.00 a day	same	same	1000.00 800.00
	1806 to'25	By 1798, ch. 86; 1801, ch. 55; and 1805, ch. 16 and 86 .	same	——		1400.00	£1400	abol	ished	or aggre. 2200.00

The facts exhibited by this table suggest many matters for reflection; some of which it may be well here to notice. There was nothing in the frame of the provincial government which made it incompatible for one judicial officer to hold at the same time any other similar office, or indeed almost any other kind of office; or

Under a proud confidence, that his whole character and conduct, public and private, will bear the closest and severest investigation,

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which prohibited his taking fees or perquisites of any kind; and it was in fact quite common for the same person to have a plurality of offices and to receive a variety of fees and perquisites as such. The last provincial governor was chancellor and also *ex officio* chief judge of the Court of Appeals, (1713, *ch.* 4, *s.* 6; 1729, *ch.* 3,) and consequently the aggregate amount of his salary as governor, chancellor, and judge must have been at least $5066, besides fees and perquisites; yet at that time there was not half the amount of population and wealth in Maryland, that there is at present, (1825.)

The Declaration of Rights declares, that no person ought to hold, at the same time, more than one office of profit; and that no chancellor or judge ought to hold any other office civil or military, or receive fees or perquisites of any kind. Consequently the authority of the chancellor and judges of the republic is limited to a single judicial office, and their official emolument is confined strictly to the salary allowed by law to that single office. It seems to have been deemed, by the first General Assembly of the Republic, "a matter of the highest importance to keep the court of the last resort totally distinct from all inferior jurisdictions." (*Votes & Pro. Sen. 29th March* 1777.) But by the amendment of the constitution, of the year 1805, the principle which had thus rigidly prohibited the holding of a plurality of offices was departed from or modified. The chief judges of the six judicial districts, it is directed, shall compose the court of appeals; and thus, as under the provincial government, the same person holds two distinct judicial offices; that is, he is chief judge of a district of county courts, and also a judge of the court of appeals.

By adverting to the salaries which had been assigned to each of these offices down to 1801 it will be seen, that the salary now allowed to them, as thus combined in the same person, is nearly the same as the aggregate amount which had been allowed to them when held separately, and by distinct persons. Thus demonstrating it to have been the intention of the General Assembly, in giving a salary of only $2200, to preserve a similar proportion between the compensation of the judges of the courts of original and appellate jurisdiction; that is, estimating about *fourteen hundred dollars* as a proper allowance for the discharge of the duties of the former, and only *eight hundred dollars* for the performance of the latter. It is then remarkable, that at all times, and under every change of circumstances in Maryland, the compensation allowed to the judges of the court of the last resort has been very small in comparison with that which has been paid to those of the courts of original jurisdiction. This, it is evident, has not been the result of prejudice or accident; and therefore, the causes of it deserve to be inquired into and considered.

In England the House of Lords is the court of the last resort. Its members receive no compensation for the discharge of their judicial duties; and those of the judges in office, or the ex-judges who sit there, as peers of the realm, receive no compensation whatever for their services there. But the chancellor and judges of the courts of original jurisdiction of Westminster Hall have very great salaries; and besides, are allowed to receive a very large amount of fees and perquisites. (*Smol. Hist. Eng. ch.* 16.) It is said, that in old times writs of error in England were rare, for that men when judgment was given against them by course of law were satisfied without prying with eagles eyes into matters of form, or the manner of proceeding, or of the trial, or insufficiency of the pleadings, &c., to the intent to find error to force the party to a new suit, and himself to a new charge and vexation.—(*Higgin's Case*, 6 *Co.* 46.)

The court of the last resort of the State of New York, is, in some respects, apparently so strikingly analogous to that of England as to have been looked upon, by some, as a mere adoption of the frame and principle of the ultimate tribunal of that country. How that may have been is, however, unimportant as regards the matter

the chancellor deems it wholly unnecessary to say one word respecting himself. When he accepted the office of chancellor of Maryland, he

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now under consideration. The New York court of last resort is composed of the Senate aided by and together with the chancellor or the judges. The senators are compensated for their attendance by an allowance of so much for each day's attendance; and the chancellor and judges are paid as judges of the courts of original jurisdiction; but receive nothing in addition for the discharge of their duties in this appellate court.

This ultimate tribunal of New York, if not the very best, is admitted on all hands to be fully equal to any court of last resort in the Union. Its business has never been suffered to accumulate or fall unreasonably behind hand; and the reports of its decisions are received every where as illustrations and guides of the highest respectability. It was organized in 1776; and, on being reviewed, by the convention, called together in 1821, for revising the constitution, it was continued and reestablished without a dissenting voice. (*Debates New York Convention*, 1821.) The senators bring into it a mass of sound common sense by which cases are met upon their merits; the propensity to overmuch technicality is checked; and there is besides, found among the senators a degree of legal science often superior to that of the bench, and always sufficient to keep down the mere *esprit du corps* of the regular judges. The senators come from, and at short intervals return to the people; and hence it has been truly and emphatically called "the court of the people;" and as such its proceedings attract much and general attention; and have necessarily a widely extended publicity which does not always follow, and can rarely be given to the proceedings of a court attended by none but lawyers, and whose decisions are selected and reported for their use only.—(*Debates N. York Conv.* 517, 609, 611.)

Although in cases of family disputes in chancery, to save the feelings of the parties and with their express consent, the matter may be privately heard; (*In the matter of Lord Portsmouth, Coop. Rep.* 106,) yet in all other cases the matters in controversy must be heard in open court; for, publicity in judicial proceedings is of the very greatest importance; "it is one of the best securities for the honest exercise of a judge's duty, that he is to exercise that duty in public." (*Wellesley v. Beaufort*, 2 *Russell*, 9.) Publicity is also one of the best shields which a skilful and impartial judge can have against the assaults of party, of prejudice, or of intrigue. It is to the enlightened and powerful public opinion to which the judges of Westminster Hall are constantly exposed, and by which they are always held responsible and protected, that their great diligence as well as their luminous and impartial judgments are to be ascribed.—(*Debates Virg. Con. of* 1829, *page* 734.)

But whatever may be the composition or structure of a court of last resort, it is important, that it should have assigned to it no duties but such as are properly appellate, as regards the *substance* of the case, or the *points* involving the merits which have been controverted and adjudicated upon by the court of original jurisdiction. According to a well regulated course of judicial proceeding the parties to a controversy should have the means, and be allowed an opportunity of bringing before the court of first resort all their allegations and proofs in any way pertinent to the subject in litigation. And, when the case has been so prepared for final decision, the judgment should, as nearly as practicable, be pronounced upon the merits, or upon those *points* on which the parties themselves have relied as involving the merits.

To allow the revising court to reverse the judgment of the tribunal of original jurisdiction, because of any mere technical objection; would be, nine times in ten, to put aside the real merits in dispute for the purpose of correcting a mere matter of form which had either been deemed unworthy of attention in the court below, or which might have been at once amended there had it been noticed in time; or to

read in the statute book, and in the Declaration of Rights of the State, that a salary of *twelve hundred and seventy-five pounds* per annum was

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allow the revising court to reverse the original judgment on any *other* ground of merit, than that which had been specially taken in the court below, would be, in effect, to allow the appellate court to assume original jurisdiction by bringing before it a controversy which in truth, never existed; or *a new point* of controversy which, if it had been presented to the court below, might have been shewn to have had no just foundation whatever.

The sending of a case back, for amendment and further proceedings thereon, almost always involves a virtual admission, that an appeal had been taken which ought never to have been allowed; either because the objection should have been made and removed in the court below; or if not there made, should have been treated above as having no just foundation; or because the error was of such a technical nature as not in any way materially to affect the merits. But the greatest evils of an ill defined power in the appellate court to remand a case in equity are those which must inevitably arise from having the judgment of that court sent, without rule or guide, on a rambling excursion through the case in search of those loose conjectures, ambiguous inferences, or latent evidences in relation to some supposed merits, for the purpose of letting in which the case should be sent back for alteration, (*Kemp v. Pryor*, 7 *Ves.* 245,) by which means a controversy, all the facts of which were from the outset fully known to all concerned, may be varied and vexatiously continued to no purpose; or a false colouring may be given to it by a party who has thus ascertained at what point his proofs were weak or insufficient.

It is universally admitted that the consent of parties cannot give to a court jurisdiction of a case of which it has no cognizance; and yet it seems to have become quite common of late to agree to the passing of a decree *pro forma* merely for the purpose of appealing, and thus in effect transferring the original jurisdiction to the court of appeals and sinking the court of first resort into a mere ministerial agent.

It is obvious then, that *proper* appellate judicial duty must be much less complicated and laborious than that which is original; because after all the circumstances of the controversy have been brought before the first court and the *points* in dispute have been there specially designated, discussed and decided upon, the case must have been considerably reduced in its compass, and the question to be determined in the ultimate tribunal must have been so fully developed that there can be then no very heavy obstacles to remove, nor any great difficulty to encounter in coming to a correct conclusion. Considering these matters, in this point of view, it is perfectly clear, that the judges of the court of last resort with less, or certainly with a no greater requisite degree of skill, have nothing like the same amount of judicial duty to perform as the judges of the courts of original jurisdiction.

It is evident, that a court of ultimate resort constituted, like that of England or of New York, of a great number of members, the majority of whom may not be lawyers by profession, would find it utterly impracticable to deal with, or to endure any thing like the distracting complexity of original jurisdiction, or to exercise any thing more than a simple and proper appellate authority. But it has been found, that an appellate tribunal constituted even of a few members, each of great legal ability, may be crushed, or totally obstructed in its course either by allowing every suitor, at his own pleasure, to crowd into it with his appeal, or by casting into it complicated controversies to be there first dealt with as by a court of original jurisdiction.—(*Tucker's Letter*, 2 *Mun. Rep. intro.* 17; *Debates Virg. Con.* 1829, *page* 760.)

It must have been owing to this comparative view of the nature and amount of the skill and labour which had been in fact, or could only with propriety be required of or assigned to the judges of the ultimate court, that the judicial salaries in Maryland

secured to the chancellor during the continuance of his commission. The *faith* of the State was, as he was thus led to believe, publicly and

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have, in this respect, been always graduated; estimating the labour of a law judge in each of the six judicial districts, into which the State was divided, as being for some time more than equal, and as being for some years past not far short of being equal to double the amount of that of a judge of the court of last resort. Delay, vacillation, or obscurity in the proceedings and adjudications of a court of ultimate resort, to which a suitor may, without restraint, appeal, cannot fail very considerably to retard the administration of justice; to render it extremely expensive, and oppressive to the poor; and very injuriously to disturb its course in every inferior branch of the judicial department. (*Debates N. York Conv.* 1821, *p.* 607.) It was with a view to prevent these evils, that the various statutes of amendment and jeofail have been made; that the forms and ceremonies of judicial proceedings have been adjusted, so as not on the one hand altogether to disappoint the eagerness of a plaintiff for an expeditious termination of his suit, while on the other, an honest defendant might be secured from oppression by allowing him a reasonable time to prepare his defence, and to have the merits of his case deliberately discussed in the court of first resort; and that so many limitations and checks have been imposed upon the range of the right of appeal.

Considering these as the true causes of greater salaries having been always given to the judges of the courts of original jurisdiction; they shew, that the right of appeal should be kept within its proper range; that the court of last resort should be permitted to exercise no original jurisdiction whatever; and that any material departure from these principles, which have every where, and at all times, been regarded as fundamental, would sink the courts of original jurisdiction into the condition of mere preparatory tribunals, or ministerial agents of the court of appeals, thereby depriving the litigants of the important benefit of a *first*, full, and open discussion, with a succeeding careful and critical revision of their controversy as contemplated by the constitution, and finally turn awry and subvert the whole judicial department of our government.

But although this comparative view of the requisite amount of the skill and labour of the judges, of the original and appellate tribunals, may sufficiently account for the difference, which has always been made, in the salaries of the judges of those courts; yet, considering the court of chancery as one of original jurisdiction, it will be necessary to advert to other circumstances to account for the difference between the salaries of the chancellor and of the judges of the common law courts of *first resort;* and even between the salaries of the judges of whole districts of such courts, and that of the chancellor.

Our code of laws is, in many respects, very peculiar in its principles; but, its great, and principal peculiarity arises from the judicial machinery by which it is administered.

That part, called the common law, as contradistinguished from equity, is administered by courts composed of a judge and a jury. It is presumed, that the judge knows the law; but, that the jury do not; and, therefore, it is the province of the judge to expound and declare the law to the jury, who are called upon to say, by their unanimous verdict, whether, by applying the law, as thus declared, the plaintiff should obtain what he asks or not. But a jury, being composed of twelve men, not lawyers, gathered from the people for the occasion, the whole matter in controversy must be reduced to a single point, or so presented as to place it in their power to put their unanimous verdict into the form of a *general* affirmative or negative *response*. A learned and experienced judge might find no great difficulty in so framing his judgment as to grant relief, in every way, suited to the most complicated case, that could be presented to him; but twelve men, unlearned in the law, would, in the same case, find it exceedingly perplexing, or altogether impracticable, *unanimously*, to

solemnly *pledged* to whoever should be appointed chancellor. May he now be permitted, respectfully, to ask—has that *faith* been kept?

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agree upon any adequate complex form of granting relief; and, therefore, a jury cannot, with propriety be called upon, in any case, even although it should involve a complicated title to property, for more than a general affirmative or negative verdict; or for a special verdict, finding the truth of the facts, leaving the conclusion of law to be pronounced by the judge.—(3 *Jeff. Corr. Lett.* 2.)

Hence it is that all judicial proceedings, according to the course of the common law, have a perpetual tendency to rigid exactness and precision; so as to be easily explained to, and applied by a jury; or, at least, so as to enable the judge to pronounce a formal judgment, as the general conclusion of law from the facts as found by the jury; either in the form of a general, or a special verdict. And, as it would be attended with great expense and inconvenience to keep constantly together a sufficient number of the people to compose juries; and to have witnesses kept long in attendance in order to testify orally before them; without all which the administration of justice, according to the course of the common law, could not proceed; the courts of common law have always been limited in their sittings to particular times or terms.

On the other hand, that branch of our code, called equity, is administered by a court of chancery, without the assistance of a jury, upon the written allegations and proofs laid before it. And, therefore, although a court of chancery, for the return of process and the more orderly conducting of its business, in other respects with convenience to its suitors, has regular *terms;* yet it is always open to meet and provide for the peculiar exigencies of every case, "for conscience and equity is always ready to render to every one his due." (1 *Rep. Cha. The Earl of Oxford's Case*, 6.) The high court of chancery of Maryland, may indeed, not only like that of England, be said to be always open in a sense, though not always equally accessible, because of the other necessary avocations of the chancellor, and because of its long vacations, (2 *Newl. Chan.* 400; 2 *Ves. & Bea.* 351;) but, to be in fact always open, and in truth always equally accessible, because of the chancellor's having no other official duties to perform, and because of there being no vacations other than those intervals between its regular periodical terms or sittings for the return of process and the hearing of cases. For, seeing the great importance of having the chancellor always in place, the General Assembly, during several of those years, that the judicial salaries remained insecure, directed, that so much should be paid to the chancellor, "if he shall reside at the seat of government."—(1782, *c.* 28; 1783, *c.* 31; 1784, *c.* 68.)

The judgments of the courts of common law are always drawn up by their clerks according to precise forms; and, therefore, it is a general rule, that where the case is of such a nature, or the relief sought is so complex as, that no adequate redress can be given by any of the fixed forms of common law judgments, the party may obtain relief in chancery, where the orders and decrees of the chancellor, although regulated by well settled principles, are always accommodated to the anomalous or peculiar nature of the cases of which his court takes cognizance. And because of the complex or peculiar frame of a great proportion of such orders and decrees they can only, according to the practice in Maryland, be drawn up by the chancellor himself.

Looking to the exact and reduced form into which a case must necessarily be presented in order to obtain a concise decision, according to a settled form, from a tribunal composed of a judge and jury on the one hand; and to the anomalous and complex frame of the cases, and of the orders and decrees thereupon in chancery, on the other, it has been very strongly, if not conclusively, argued, that the trial by jury itself, in controversies as to the right of property, must be altogether abandoned, or certainly could not exist in its purity and vigour, without the helping hand of a court of chancery.—(*Southern Review, Feb.* 1829, *art.* 3.; *The Federalist, No.* 83.)

The chancellor now claims the payment of his salary, under the act of 1798, ch. 86, at the rate of *twelve hundred and seventy-five*

Junius, in his letter of the 14th of November 1770 to Lord Mansfield, says, "Instead of those certain, positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice. Decisions given upon such principles do not alarm the public so much as they ought, because the consequence and tendency of each particular instance is not observed or regarded. In the meantime, the practice gains ground; the court of king's bench becomes a court of equity; and the judge instead of consulting strictly the law of the land refers only to the wisdom of the court, and to the purity of his own conscience."

Lord Redesdale speaking of the same judge says, "Lord Mansfield had on his mind prejudices derived from his familiarity with the Scotch law, where law and equity are administered in the same courts, and where the distinction between them which subsists with us is not known, and there are many things in his decisions which shew that his mind had received a tinge on that subject not quite consistent with the constitution of England and Ireland in the administration of justice. It is a most important part of that constitution, that the jurisdictions of the courts of law and equity should be kept perfectly distinct; nothing contributes more to the due administration of justice. And though they act in a great degree by the same rules, yet they act in a different manner, and their modes of affording relief are different; and any body who sees what passes in the courts of justice in Scotland, will not lament that this distinction prevails. But Lord Mansfield seems to have considered, that it manifested liberality of sentiment to endeavour to give the courts of law the powers which are vested in courts of equity; that it was the duty of a good judge *ampliare jurisdictionem*. This I think is rather a narrow view of this subject; it is looking at particular cases rather than at the general principles of administering justice, observing small inconveniences and overlooking great ones."—(*Shannon v. Bradstreet*, 1 *Scho. & Lefr.* 66; *Sugden's Letters*, 4.)

As has been observed in relation to this matter by our own great sage, "the only natural improvement of the common law, is through its homogeneous ally, the chancery, in which new principles are to be examined, concocted, and digested. But when, by repeated decisions and modifications, they are rendered pure and certain, they should be transferred by statute to the courts of common law and placed within the pale of juries."—(4 *Jeff. Corr. let.* 104.) And in relation to those alterations of our code, so frequently made by the most crude and ill digested scraps of legislative enactment, he observes, that "the instability of our laws, is really an immense evil. I think it would be well to provide in our constitutions, that there shall always be a twelvemonth between the engrossing a bill and passing it; that it should then be offered to its passage without changing a word; and that if circumstances should be thought to require a speedier passage, it should take two-thirds of both houses, instead of a bare majority."—(2 *Jeff. Corr. let.* 117.)

In these points of view then, a court of chancery is not only a useful, but an indispensable part of our judicial system. And, when the proper judicial duties of a chancellor are thus compared with those of a judge of a court of common law; and especially with those which are, alone, properly assignable to a court of the last resort, it cannot fail to strike every one, that those of a chancellor, independently of all his other irregular and incidental duties, must require a vast deal more skill and labour than those of a common law judge in any situation whatever; and that the larger amount of salary which has, at all times, been allowed to the chancellor affords the most satisfactory proof, that this matter has been always so distinctly understood by the people of Maryland.

pounds per annum, for the past year, or so much as has become due and remains unpaid; with *legal interest* on such portions as have been demanded and withheld. And he also claims the benefit of some such provision as the General Assembly may now think proper to make, for the regular quarterly payment of that *amount* hereafter, *during the continuance of his commission.* "It is *justice* that establisheth a nation." The chancellor asks no more than *justice.* His case is with you.

THEODORICK BLAND,
Chancellor of the State of Maryland.

Annapolis, 26th December, 1825.

This Memorial was presented and read in the House of Delegates, on the third day after the commencement of the session, and referred to a committee; who made a report thereupon.(*b*) After which, the matter having been considered, was called up, discussed, and finally passed upon by each House. Whence it may be fairly assumed, that the following resolutions, recognizing the chancellor's claims, may be considered as a deliberate and final judgment of the General Assembly of Maryland affirming, in substance and in general terms, the leading and material principles set forth and asserted by the chancellor in his Memorial. Considered in this point of view, this is a case of much and lasting importance as regards the judiciary in general as well as in relation to the chancellor in particular.

17*th February*, 1826. *By the General Assembly of Maryland, Resolved*, That the salary of the Chancellor shall be three thousand four hundred dollars during the continuance of the commission of the present chancellor, and no longer; and after the expiration of his commission, such salary shall be provided for the succeeding chancellor as the legislature shall then think proper to fix and establish.

3*d March*, 1826. *By the General Assembly of Maryland, Resolved*, That the treasurer of the Western Shore pay unto the order of *Theodorick Bland*, the sum of three thousand four hundred dollars for his salary as chancellor for the year ending on the sixteenth day of February 1826; and the salary of the present chancellor, as declared by a resolution passed at this session of the General Assembly, shall be paid to him quarterly by the treasurer of the Western Shore, during the continuance of his commission and no longer.

(*b*) Jour. H. Del. 28th December, 1825, and 24th January, 1826.

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It is enough that an affidavit to an answer is so positive, that, if false, the party may be prosecuted for perjury.—Coale *v.* Chase, 137.

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Can real estate be constitutionally converted into personalty to the prejudice of any one without his consent? 457.

COSTS.

Postage, notarial seals, &c. cannot be taxed as costs.—*McMechen* v. *Story*, 186.

On the bill's being dismissed by the plaintiff, the costs on being taxed by the register may be ordered to be paid, or cause shewn.—*Diffenderffer* v. *Hillen*, 191.

On a bill for dower, if the heir throws no difficulty in the way, the widow has no costs.—H. K. Chase's case, 231.

There may be a revivor of a decree for costs.—C. D. Owings' case, 409.

In partition the costs are borne equally or in proportion to the shares of each.—Hughes' case, 50; Corse v. Polk, 234.

The auditor's fees are a part of the costs, and may be recovered as such.—Dorsey *v.* Hammond, 467.

The origin, nature, and extent of the rule which may be laid on a plaintiff to give security for costs.—Mayer *v.* Tyson, 561.

COURT OF CHANCERY.

This court is in its institution and forms of procedure absolutely civil; yet if relief be asked on the ground of fraud against an instrument, it may be shown to be a forgery.—Fornshill *v.* Murray, 484.

The court of chancery of Maryland derived from and similar to that of England.—Cunningham *v.* Browning, 301; Chancellor's case, 648.

This is not a term court in the sense of the common law, although it has its regular terms and sittings.—Burch *v.* Scott, 126; Chancellor's case, 678.

The difference between the duties of courts of common law and courts of equity.—Chancellor's case, *ib.*

The peculiar and complex nature of the duties of a chancellor, 678.
This court cannot order money in the hands of a sheriff or officer of another court to be brought into this court.—Jones *v.* Jones, 461.

CREDITOR'S SUIT.

Under a bill against the heirs of a mortgagor, or for the sale of a deceased's real estate to effect a division, the creditors of the ancestor may come in against such realty on the ground of the insufficiency of the personalty.—Latimer *v.* Hanson, 52; *O'Brien* v. *Bennet*, 86; Fenwick *v.* Laughlin, 475; *Spurrier* v. *Spurrier*, 475.
Where a decree for a sale expressly or tacitly affirms the validity of the plaintiff's claim, the allowance of interest upon it is a subject of further directions.—Strike's case, 70.
It is most usual in the decree for a sale itself to direct the trustee to give notice to creditors to bring in their claims, every thing in relation to which is the subject of further directions, 71.
It is not indispensably necessary that the bill should state, that the plaintiff sues as well for himself as others, it is sufficient that such appears to be the object of the suit, 84.
A creditor may be let in by petition either before or after the decree, but the most usual way is for creditors to come in by filing the vouchers of their claims, 85.
If a creditor comes in after a distribution has been awarded by the auditor, he must pay the costs of the necessary reaudit; but he can't be let in after a final account has been ratified, 86; Williamson *v.* Wilson, 441; Dorsey *v.* Hammond, 468.
After the claim of a creditor has been contested upon hearing, the heir cannot plead or rely on the statute of limitations in bar of it.—*McMechen* v. *Chase*, 85.
The creditors may be called in before a decree so as to ascertain what amount must be raised by a sale.—*Corrie* v. *Clarke*, 85.
Where an executor had paid away all the personalty and had nothing to answer pending suits against him, he was permitted to have the creditors called in to partake of a surplus of a mortgaged estate in a suit instituted by him and others as representatives of the deceased.—*O'Brian* v. *Bennet*, 86.
Claims in a creditor's suit may be paid if authenticated in the same manner as required in the orphans court.—Strike's case, 88; Dorsey *v.* Hammond, 470.
Creditors' suits founded on insolvency are governed by the same rules as those against the representatives of a deceased debtor—the schedule evidence; but if any descrepancy, then full proof may be required.—Strike's case, 90.
If the statute of limitations be not in some form specially relied on against a claim it cannot be taken advantage of, 90.
The statute of limitations in bar of a claim brought in under the decree, may be relied on by any one of the original parties or by a co-creditor, 93.
Where it appears by the voucher, that the deceased was surety with others, the creditor must also shew that the principal and co-security are insolvent.—*Edmondson* v. *Frazier*, 92; Dorsey *v.* Hammond, 472.
What may be deemed sufficient evidence of the insolvency of the principal or co-security.—*Spurrier* v. *Spurrier*, 477.
The mere filing of the schedule of an insolvent cannot be treated as a coming in of all the creditors therein named.—Strike's case, 96.
Where a testator devises a portion of his real and personal estate subject to the payment of a particular debt, which the devisee taking under the will, fails to pay, the executor of the devisor may compel the devisee to pay in order to save the personalty of the devisor.—*Pue* v. *Dorsey*, 139.
If, in such case, the devisee is dead leaving an infant heir, and his personal estate has been exhausted, the court will by decree appoint a trustee to make sale of the realty so charged, 138.
A creditor having an equitable lien cannot by the usual notice be compelled to come in under the decree, but if he does come in then the purchaser will take clear of his claim.—*Millar* v. *Baker*, 148.
The decree for a sale being founded on the fact of the insufficiency of the personal estate establishes that point, so that the administrator's accounts cannot be impeached for the purpose of turning a creditor over against the personalty.—Mackubin *v.* Brown, 414, 415.
If the creditors were infants they may be let in on applying soon after they attain full age, even although notice has been given to creditors and a final distribution has been made, 415.
A suit brought by one partner against the other to prevent a misapplication of the partnership effects, alleging the firm to be insolvent; on that allegation being admitted or proved, the suit must thenceforth be treated as a creditors' suit.—Williamson *v.* Wilson, 430.
A suit by a creditor against trustees to whom the debtor had conveyed his property for the benefit of his creditors, treated as a creditors' suit.—*Barnaby* v. *Hollingsworth*, 431.
Creditors coming in may be ordered to

answer interrogatories on oath.—Williamson *v.* Wilson, 433.
A creditor coming in under the decree takes the position of a plaintiff, 434.
In a creditor's suit, testimony in support of a claim must be taken in such a manner as to prevent a cross examination, and insure a correct report of the proof to the court, 434.
Before a distribution can be made the creditors must be notified and called in, 440.
After which notification, unless some difficulty occurs requiring previous directions, the auditor states a first account as of course informing the court of the objections, if any, to each claim as they appear upon the face of the proceedings, 440; Dorsey *v.* Hammond, 470.
The decree for a sale so far as it assumes the validity of the originally suing creditor's claim is conclusive.—Strike's case, 68; Williamson *v.* Wilson, 441.
Creditors may be allowed time to take testimony in support of their claims; but if it be not taken within a specified or a reasonable time, a final audit may be directed excluding all claims not then sufficiently authenticated, 441.
Mortgagees and judgment creditors may be let in, and must be allowed their priorities.—Jones *v.* Jones, 452.
The surplus of the sale of the realty in a creditor's suit considered as a part of the real assets which must be returned to the heirs, 452.
No part of the personal estate of a deceased debtor can be applied in payment of his debts without making his executor or administrator a party to the suit, 460.
All the costs and expenses are first deducted from the proceeds of sale, and then the balance is distributed, by which means each creditor is made to contribute to the expense of the suit.—Dorsey *v.* Hammond, 468.
Each creditor is entitled to a proportion of the interest accruing on the purchase money, according to the sum stated by the auditor to be then due him.—Low *v.* Conner, 468.
The proceeds of the sale of the real assets are to be distributed in the same order as the personal assets.—Dorsey *v.* Hammond, 470.
A judgment against the executor or administrator is no evidence against the heir, 470.
If full proof of a claim be required, it must be established as an issue joined before a jury, 471.
Where the proceeds of sale are more than sufficient to satisfy all, the auditor's report, as to the undisputed claims, may be at once affirmed before the commissions and costs have been allowed, or the suspended claims have been disposed of.—*Spurrier* v. *Spurrier*, 476.
The chancellor cannot direct the payment or discount of any claim before the sale has been ratified, 475.

CROP.

On a bill for specific performance, the defendant being unable to make a valid title the plaintiff was directed to deliver possession, reserving to him the liberty to finish his crop of all kinds and to remove his crop and cattle.—*Rawlings* v. *Carroll*, 76.
Possession will not be delivered under the decree itself to a party, or to a purchaser under it, where it would be attended with the loss of the then growing crop. Dorsey *v.* Campbell, 365; *Chapline* v. *Chapline*, 364; *Wright* v. *Wright*, 365.
Under a decree for a sale in a creditors suit, the then growing crop should not be sold.—*Taylor* v. *Colegate*, 365.

DEBTOR & CREDITOR.

Where two or more sue as joint creditors, the proportion due to each may be adjusted after the sale has been made and the proceeds brought in.—Hoye *v.* Penn, 34.
The surplus of the proceeds of a sale may be awarded to the representatives of the debtor in proportion to their respective interests, 38.
Where the property of a debtor has been sold under a decree for an amount equal to the whole debt, the debtor is discharged, 43.
Where there are two debtors, and the property of each has been sold for an amount equal to the proportion due from each, leaving a surplus to each, as to such surplus they are to be regarded as creditors against the fund; and no subsequent depreciation or loss of the fund taken from one can be made up out of the surplus of the other, 43.
A creditor cannot be permitted to split up his claim and bring a separate suit for each part; or after a decree to add in any way to its amount.—Strike's case, 95.
A debt will not be allowed to carry interest during the time the debtor has been restrained from paying.—Chase *v.* Manhardt, 343.
A debtor on being sued may, in all cases, have leave to bring the debt into court so as to stop interest and costs, 343.

DECREE.

Where two or more are equally and jointly liable, the property of each may be directed to be sold in the first instance, so as to place the burthen upon each equally or in due proportion.—Hoye *v.* Penn, 33, 34.
A decree which declares certain convey-

ances to be null and void as against the plaintiff, and directs the property to be sold and the proceeds brought in declaring, "that all equities as to the distribution of the proceeds of sale are reserved by the court for hearing," on their being brought in; necessarily establishes the plaintiff's claim.—Strike's case, 68.

During the term decrees or orders may be altered or rescinded on motion or petition, but after only by bill.—Burch *v.* Scott, 120.

A decree affecting the rights of one not a party to it is, as to him, fraudulent, but it can only be corrected by an original bill, 120.

A decretal order, what and how drawn up according to the English practice, 121.

A decree considered as enrolled when signed and filed, 121.

During the term an interlocutory decree may be set aside on appearance without answer, under the general powers of the court.—*Hepburn* v. *Mollison*, 127.

A decree by default for more than is due may, after the term, if the plaintiff has lost no testimony, be set aside to let in a defence upon the merits.—Burch *v.* Scott, 129.

To make a decree a good bar in a subsequent suit it must be shewn, that the matter of the bill was *res judicata*.—H. K. Chase's case, 220.

The form of an interlocutory decree for assigning dower in a house, 234.

Where several defendants are jointly liable there must be a decree against all or none, and where several are bound to contribute there may be a decree over to enforce the contribution.—Lingan *v.* Henderson, 275; Hodges *v.* Mullikin, 507.

In its decree the court must be consistent with itself, it cannot say that there is, and also that there is not any cause of suit.—Lingan *v.* Henderson, 275.

But without contradiction the court may, to meet the nature of the case, pass a separate, a reciprocal, a direct, or an inverted decree, 276.

Where an annual sum is charged upon land, or a sum is stipulated to be paid periodically, the decree may order the payment of what is then due and be allowed to stand as a security for what may thereafter become due, which may be enforced in a summary way.—Rebecca Owings' case, 297.

A decree may grant relief upon terms, or so as to dispose of the whole case.—Colegate D. Owings' case, 403.

On a bill to account there may be a decree against the plaintiff or against the defendant, according as the balance may be shewn, 404.

A decree may be so framed as to meet the case disclosed; as a decree against an agent in the second degree; a decree in favour of a surety against his principal; a decree between two or more defendants; a cross decree to enforce specific performance; a decree to redeem may be made to operate as a decree to foreclose; or a decree against both parties in favour of the State, 404.

A decree must stand for what it purports to be until revised or reversed.—Estep *v.* Watkins, 489.

A decree against several will only be opened in favour of him who asks it.—Hodges *v.* Mullikin, 507.

DELIVERY OF POSSESSION.

On a sale under a decree the delivery of possession to the purchaser by injunction well settled, and of right, where the possessor does not claim to hold by title paramount to the parties.—Dorsey *v.* Campbell, 363; *McKomb* v. *Kankey*, 363.

But immediate possession will not be ordered when it would be attended with a loss of the then growing crop.—*Chapline* v. *Chapline*, 364; *Wright* v. *Wright*, 365; *Taylor* v. *Colegate*, 365.

Where possession is ordered to be delivered to a purchaser under a *fieri faciãs*, there can be no saving as to the then growing crop.—Dorsey *v.* Campbell, 365.

The mode of ordering possession to be delivered to a purchaser under a *fieri facias*, 363.

DEPRECIATION.

The depreciation of property soon after the year 1819, its causes and consequences.—Hoye *v.* Penn, 41.

The depreciation of paper money during the revolution.—The Chancellor's case, 633.

DEVISE.

A devise of land to W. O. his heirs and assigns upon condition, that he, or the person to whom the estate may eventually pass, maintain or pay £60 a year for the maintenance of Rebecca, is a condition which runs with, and gives her a particular interest in the land, not as a rent or an annuity, but for the payment of which he who takes and enjoys the land is personally liable.—Rebecca Owings' case, 296.

A bequest of the debt carries with it the mortgage and all other securities of the debt.—Iglehart *v.* Armiger, 524.

A devise to a religious society, without the leave of the legislature, is void.—Murphy *v.* Dallam, 529.

DIRECTIONS.

Further directions are those orders given

for the purpose of following out the equity established in substance by the decree.—Strike's case, 69.

DISCOUNT.

The nature and origin of discount in bar; discount, recouper, and set off, in principle the same.—Strike's case, 79.

A claim for rents and profits may be set off against that for improvements made by a *bona fide* possessor, 79.

But a wrong doer cannot place himself in a situation to obtain a discount, 80.

DOWER.

Dower assigned by commissioners appointed to make partition under the act to direct descents.—Hughes' case, 47.

A widow who elects to take the estate devised to her in lieu of dower, is to be deemed a purchaser for a fair consideration to the value of her dower, and must have her claim sustained as a lien to that extent in preference to creditors.—Margaret Hall's case, 203.

If the husband had before marriage made a lease for years reserving rent, the wife might have been endowed of the reversion and of the rent from the death of the husband; but if no rent has been reserved, then of the reversion only with a *cesset executio* during the term.—H. K. Chase's case, 227.

If husband and wife join in making a mortgage, her dower can be affected only to the extent of the mortgage, and she may call upon the personal representative of the husband to discharge the mortgage, 227.

If the wife join in levying a fine, or in acknowledging a deed under the act of Assembly to make a lease or mortgage, her dower can be affected only so far as may be necessary to give it validity according to the express extent of the fine or deed, 228—231.

In equity the widow may have an account of the rents and profits of her dower from the death of her husband, and costs if her claim be opposed, 231.

The widow can only recover according to the actual value, and will be allowed interest on the rents and profits as they accrue, 231.

Upon a decree for dower there can be no sequestration of the two-thirds to satisfy the claim for rents and profits, although they may be taken like any other property under a *fieri facias*, 232.

Where the property is incapable of division, dower may be given in the form of a rent distrainable of common right, 233.

The form of an interlocutory decree for assigning dower in a single house, 234.

On a sale to effect a division, a portion of the proceeds may be awarded to the widow in lieu of dower.—*Spurrier* v. *Spurrier*, 477.

ELECTION.

Where a testator devises a part of his estate to one who has a claim upon it independently of him, the devisee may be put to his election, and shall not have both.—Hall *v.* Hall, 134.

But the intention must be distinctly expressed or strongly manifested, or it must appear that the claim is irreconcilable with the devise, or that to sustain the claim would throw the testator's estate into a different channel, 135.

EQUITY.

That which might have been ordered, when fairly done may be confirmed: as where land devised to be sold was sold by the executor under an apprehension that he had been authorized to do so, the sale was confirmed.—*Ex parte Margaret Black*, 142.

Where by agreement a judgment is entered, to allow for payments, or upon a verdict obtained by surprise or mistake, equity will relieve.—Chase *v.* Manhardt, 348.

EVIDENCE.

Depositions taken before the revolution under the statute of 5 Geo. 2, c. 7, received and read.—*Rawlings* v. *Stewart*, 22.

Where a deposition or affidavit is on affirmation, and the person taking it does not certify, that the affirmant is a quaker, &c. the deposition or affidavit can be of no avail.—*Ringgold* v. *Jones*, 90.

There is no publication of depositions, but all objections are open and may be taken at the hearing.—Strike's case, 96.

The commissioners may summon witnesses to testify, and on the commissioners certifying that the witness failed or refused to attend, an attachment against him may be ordered.—*Bryson* v. *Petty*, 182.

A solicitor cannot be permitted to divulge the secrets of his client without his consent, and if he be not a party to consent the solicitor must remain silent.—H. K. Chase's case, 222; Hodges *v.* Mullikin, 509.

On bill or petition on oath in the same case, a commission may be granted to take the testimony of an aged or infirm witness *de bene esse*.—Lingan *v.* Henderson, 238.

An objection before the commissioners that the evidence is not such as is required by the statute of frauds, if that statute be not relied on as a defence, cannot be allowed, 248.

A receipt is not in all cases conclusive,

but that usually given for the purchase money and endorsed on a deed for land is evidence of the lowest order, 249.
Parol proof which goes to sustain and supply deficiences in a written instrument may be received, 249.
The answer of one defendant cannot be evidence for another, except in some particular cases, 267.
A co-plaintiff or a co-defendant may be examined as a witness if he has no interest in the matter, or none in that part of it as to which separate relief may be given, 268.
If a co-defendant has been received by the plaintiff as a witness to the whole, the bill as to him must be dismissed, 268.
If a defendant in argument relies upon the answer of his co-defendant as evidence in his favour, he thereby makes it evidence against himself.—Chase *v.* Manhardt, 336.
Certified copies from the land office are deemed legal evidence.—Cunningham *v.* Browning, 308.
A letter cannot be used as evidence of a contract in connexion with a part only of the verbal testimony.—Ogden *v.* Ogden, 287.
The mode of taking testimony in a creditors suit so as to insure a correct report of it to the court.—Williamson *v.* Wilson, 434.
Evidence may be taken before a justice of the peace under a special order.—McKim *v.* Thompson, 154; *Clapham* v. *Thompson*, 124.
The mode of taking testimony here before a justice of the peace in relation to any interlocutory matter unknown to the English practice.—Hodges *v.* Mullikin, 507.
A defendant as to whom a decree cannot be opened is a competent witness for a co-defendant who applies for leave to file a bill of review, 507.
A trustee under the decree whose liability to refund what has been paid him as commissioner will not be increased by opening the decree, is a competent witness on an application for leave to file a bill of review, 508.

EXECUTION.

When property equal in value to the debt has been taken under a *fieri facias*, the debtor is discharged, and the creditor must look to the sheriff.—Hoye *v.* Penn, 43.
To enforce the execution of a decree for the payment of money, and also for indemnification, the plaintiff may have a *ca. sa.* and an attachment at the same time.—*Bryson* v. *Petty*, 183.
A room in a tavern may be used as a gaol by the sheriff to confine a person under a *ca. sa.*, 183.
Upon a decree for dower, there can be no sequestration of the two-thirds to satisfy the claim for rents and profits of the dower.—H. K. Chase's case, 372.
A decree for an annual sum may be enforced in a summary way, or by putting a receiver upon the estate charged.—Rebecca Owings' case, 297.
The manner in which possession may be ordered to be delivered to a purchaser under a *fieri facias*.—Dorsey *v.* Campbell, 364.
Real estate not liable by the common law to be taken in execution and sold for debt, except at the suit of the State. Jones *v.* Jones, 445; *Birchfield* v. *Brown*, 446.
By *elegit* the half, and aftewards by statute the whole of the real estate of the debtor made liable.—Jones *v.* Jones, 447.
The nature and extent of a judicial lien upon real estate, 447.
Although a lien fastens upon real estate from the date of the judgment, no execution can be issued if the case has abated by the death of either party, until it has been revived, 448.
There is no lien upon personal estate as against third persons, until the *fieri facias* has been delivered to the sheriff, 448.
By the seizure the sheriff acquires a special property in the goods taken, 448.
A *fieri facias* bearing *teste* before the death of the defendant evicts the real and personal estate from the hands of the heir or devisee, and from the executor or administrator, 449.
Real or personal property taken and sold under a *fieri facias* is thereby converted into money, the realty being thus converted into personalty, 450.
A share of the proceeds of the sale of realty, a chose in action, cannot be taken in execution, yet it may be under circumstances applied by the court to the satisfaction of creditors, 459.
Money cannot be taken in execution, nor can money in the hands of a sheriff made under an execution from another court be ordered to be brought into this court, 460.
Public stock, choses in action, &c. cannot be taken in execution; but choses in action may be attached at law.—Watkins *v.* Dorset, 533.
If a party cannot obtain satisfaction by any execution at law, he may proceed by bill in equity, 534.
A judicial attachment cannot be awarded by the court of chancery, 534.
To constitute a valid title to land purchased at a sheriff's sale, it is necessary that there should be a return made to the *fieri facias*, that the return should specify the land sold, and that the return should be recorded.—Duvall *v.* Waters, 589.

What is deemed a sufficiently certain description in the return of a *fieri facias* of the land sold under it, 591.

EXECUTORS & ADMINISTRATORS.

An executor or administrator upon letters granted in the District of Columbia may sue here, but not if granted in another State or a foreign country.—Burch *v.* Scott, 113, note.

Land devised to be sold was sold by the executor under an apprehension, that he was authorized to sell, the sale was affirmed.—*Ex parte Margaret Black*, 142.

No part of the personal estate of a deceased debtor can be applied in payment of his debts without making his executor or administrator a party to the suit.—Jones *v.* Jones, 460.

An absolute judgment against an executor or administrator is conclusive evidence against him of a sufficiency of assets.—Dorsey *v.* Hammond, 472.

An executor or administrator who overpays is allowed to take the place of the creditor so paid, but he must prove the claim in like manner as might have been required of the creditor.—Watkins *v.* Dorsett, 531; *Ex parte Street*, 532.

FRAUD.

A voluntary conveyance by a parent who is indebted at the time, is of itself fraudulent as against creditors, although good between the parties.—Hoye *v.* Penn, 32; Duvall *v.* Waters, 587.

Where the defrauded party comes to have the conveyance set aside, equity will let it stand for what is really due, otherwise if he who takes under it comes to have it executed.—Strike's case, 81.

If the statute of frauds be not specially relied on, or nothing is said of it, it is waived, and the defendant cannot object to any proof because it is not in writing.—Lingan *v.* Henderson, 248; Ogden *v.* Ogden, 288.

The whole agreement, as well the consideration as the promise, must be in writing.—Ogden *v.* Ogden, 287.

The statute applies not to promises to marry, but to pay portions, &c. in consideration of marriage, 287.

Although the defendant relies upon the statute, yet he must answer fully, so that if any thing appears which takes the case out of the statute the plaintiff may have relief, 288.

Marriage alone is not a part performance; but if the man in consequence of a letter to himself, his father, or a friend, promising a portion, marries, it is a performance on his part, and the promise may be enforced, 288.

Equity will in some cases relieve a party from the consequences of a fraud which has been practised upon a third person.—Chase *v.* Manhardt, 350.

If a deed be not read at all, or be read improperly to an illiterate man, he will not be bound by it.—Colegate D. Owings' case, 391.

Weakness of mind may be taken into consideration with other circumstances to shew fraud, 377—390.

What is meant by such weakness as an evidence of fraud, 391.

The various kinds of circumstances which with weakness of mind constitute fraud, 391.

Fraud and deceit by him who is trusted is the most odious, 397.

HUSBAND AND WIFE.

As to the mode in which a *feme covert* may dispose of her real estate.—H. K. Chase's case, 228.

A wife cannot be a witness for or against her husband; therefore he cannot be bound or benefited by her answer.—Lingan *v.* Henderson, 260—260.

In some cases the apparently joint answer of husband and wife may be treated as her separate answer, 269.

If she apprehends he will not make a proper defence for her, she may as of course obtain leave to answer separately, 270.

Real estate sold to effect a division, the rights of a *feme covert* ought not to be prejudiced thereby.—Jones *v.* Jones, 455.

A share of real estate given to the wife for life, remainder to her children, on a sale to effect a division her share may be paid to her husband on his giving bond to pay to her children after her death.—*Wells* v. *Roloson*, 456.

After a sale to effect a division, the husband of one of the parceners died, her share of the proceeds paid to herself, 456; Iglehart *v.* Armiger, 521.

Real estate sold to effect a divison, the husband and wife may elect to take a portion of the proceeds of sale in lieu of the use of the whole given to the wife for life.—*Wells* v. *Roloson*, 457.

If a *feme covert* devisee for life elects to take a part of the proceeds of sale as the value and in lieu of her life estate, she must do so by an application in writing attested.—*Wells* v. *Roloson*, 457.

The law recognised in relation to what is called the wife's equity.—Jones *v.* Jones, 459.

A sale to effect a division, one share being the property of the wife, the wife died, the share considered as personalty and awarded to the husband.—*Spurrier* v. *Spurrier*, 476—478.

IMPROVEMENTS.

A mortgagee in possession may be allow-

ed for repairs and lasting improvements.—*Rawlings* v. *Stewart*, 22.
On a bill for specific performance the defendant being unable to make a valid title, he was ordered to make the plaintiff a reasonable allowance for such improvements as would be beneficial to any subsequent possessor.—*Rawlings* v. *Carroll*, 76.
A *bona fide* possessor ignorant of his adversary's title may be allowed for such improvements as enhance the value of the property.—Strike's case, 76.
A *mala fide* possessor can have no claim to any such allowance, 77; *McKomb* v. *Kankey*, 363.
A claim by a *bona fide* possessor for improvements may be discounted from that made against him for rents and profits or for waste.—Strike's case, 79; *Rawlings* v. *Carroll*, 76.
A *mala fide* meddler cannot be allowed any thing for taxes, &c. in relief of the property any more than for improvements.—Strike's case, 83.
In opposition to a claim for dower the heir can have no allowance for meliorations and improvements.—H. K. Chase's case, 232.
A decree for the sale of land may be of such a nature as to leave the claim for improvements to be adjusted by further directions.—Strike's case, 70.

INFANT.

Money will not be paid out to a guardian *ad litem* of an infant party.—*Corrie* v. *Clarke*, 85.
Land might, before the act of 1785, ch. 72, s. 5, have been sold to pay debts with the consent, according to the act of 1773, ch. 7, s. 2, of the guardian *ad litem* of the infant heir.—*Pue* v. *Dorsey*, 140.
The proceeds of the sale of land devised to a woman for life, remainder to her children, paid to her husband as their guardian on his giving bond.—*Wells* v. *Roloson*, 456, 457.
After a sale to effect a division the shares awarded to the infants may be paid to their mother on her giving bond to account as their guardian.—*Spurrier* v. *Spurrier*, 477.

INJUNCTION.

Orders to stay proceedings or the execution of a decree of this court treated as injunctions.—Burch v. Scott, 123; *Clapham* v. *Thompson*, 123.
Where an injunction has been obtained against an executor or administrator, it will be sufficient if the answer states facts which must have been within the knowledge of the testator only, upon the belief of the executor or administrator to have the injunction dissolved.—Coale v. Chase, 137.
In what cases on the bill alone an injunction, if prayed, may be granted, and how the bill must be verified.—Jones *v.* Magill, 180; *Jenifer* v. *Stone*, 189; *Paul* v. *Nixon*, 201.
How and under what circumstances on the coming in of the answer there may be a motion to dissolve, 180.
The rule further proceedings and the exceptions to the answer may be heard and acted upon together with the motion to dissolve, 181; Gibson *v.* Tilton, 353.
An injunction in extraordinary cases is granted upon terms suited to the peculiar circumstances, allowing a motion to dissolve to be heard at an early day.—Jones *v.* Magill, 182; *McMechen* v. *Story*, 184; *Jenifer* v. *Stone*, 188; *Diffenderffer* v. *Hillen*, 190; Williamson v. Wilson, 419.
Under the same bill a *ne exeat* as well as an injunction may be granted.—*Bryson* v. *Petty*, 182.
An injunction may be partially dissolved on the defendant's giving bond, 182.
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A defendant without waiting a *subpœna* may answer immediately, and thereupon move for a dissolution, 185.
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The discretionary power of commissioners to lay out a new road or street cannot be restrained by injunction.—*Worthington* v. *Bicknell*, 187; *Diffenderffer* v. *Hillen*, 190; *Pascault* v. *The Commissioners of Baltimore*, 584.
An injunction to stay the levying of what is due when the party insists on levying what is not due.—*Jenifer* v. *Stone*, 188.
Where there are several defendants all must answer before there can be a motion to dissolve; but to this there are exceptions.—Jones *v.* Magill, 190; *Stewart* v. *Barry*, 192; *Williams* v. *Hall*, 194; *Chapline* v. *Betty*, 197; *Tong* v. *Oliver*, 199.
When the chancellor is absent from the city where the court is held, an injunction may be issued with the sanction of a disinterested solicitor, subject to the approval of the chancellor.—*Stewart* v. *Berry*, 191.
An injunction cannot be dissolved on a consideration of the opposing title, without an answer to the interrogatories of the bill, 192.
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solved without allowing time to give good security.—*Williams* v. *Hall*, 194.
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Although a defendant cannot directly compel his co-defendant to answer, yet the plaintiff may be forced to urge forward, so as to enable the defendant to move for a dissolution.—Jones *v.* Magill, 198; *Tong* v. *Oliver*, 199.
The answer of an administrator if contradictory will not be sufficient to dissolve the injunction.—*Tong* v. *Oliver*, 199.
After the dissolution of the injunction the plaintiff may proceed on his bill for relief at the final hearing.—*Paul* v. *Nixon*, 201.
On a motion to dissolve, the *facts* set forth in the answer are alone to be regarded, not the opinions of the defendant.—Chase *v.* Manhardt, 335.
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If the facts on which the plaintiff's equity rests are positively denied, the injunction must be dissolved.—Gibson *v.* Tilton, 355.
An injunction may be granted and continued as a suitable auxiliary to the appointment of a receiver.—Williamson *v.* Wilson, 428.
The mode of obtaining a dissolution of the injunction where the suit has abated by the death of a party.—Griffith *v.* Bronaugh, 548.
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Where the dissolution of an injunction has been obtained by fraud, it may be reinstated, 568.
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According to the English authorities an injunction cannot be granted to stay waste, if the title be denied, 570, 577.
But in cases of patent right, nuisance, and some others, an injunction may be granted *pendente lite* at law, 577—584.
Here an injunction may be granted to stay waste pending an action at law, or a suit in this court to try the right, 580; *The Attorney General* v. *Norwood*, 581; *Coale* v. *Garretson*, 581; *Flannagan* v. *Krips*, 582; *Gittings* v. *Dew*, 583.
But if the plaintiff fails or refuses to institute a suit to establish his right, he can have no injunction to stay trespass upon land his title to which is denied.—Duvall *v.* Waters, 585.
If after the plaintiff has filed his bill here to establish his right, waste is threatened or committed, he should apply here for an injunction by petition, not by bill, 585.
An injunction to stay waste pending a suit to try the right will not prevent the occupying tenant from making the ordinary uses of the land, 584.
After a judgment at law the injunction may be perpetuated, dissolved, or limited according to the extent of that judgment.—Hill *v.* Bowie, 594.

INSOLVENCY.

A person in solvent circumstances may pay as he pleases, but when he falls into a condition of insolvency that privilege ceases, and his effects must be distributed equally or pro rata among all his creditors.—Williamson *v.* Wilson, 425.

INVESTMENT.

Money in court or in the hands of its trustee, may be invested so as to be made productive pending the litigation.—Latimer *v.* Hanson, 56.

ISSUE OF FACT.

In a creditor's suit if a claim be strongly litigated and of difficult investigation, an issue may be sent out.—*Ringgold* v. *Jones*, 89.
It is not indispensably necessary in any case that an issue should be made up; it is only resorted to where the weight of the evidence can be better estimated by a jury.—Fornshill v. Murray, 485.

JUDICIARY.

The colonial courts of vice admiralty and their jurisdiction.—The Chancellor's case, 607; *Hastings* v. *Plater*, 613.
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JUDGMENT.

At common law as between party and party, a judgment binds from the first day of the term; but as against third persons it only operates as a lien upon the real estate from the day on which it is signed, and upon the personalty from the day on which the *fieri facias* is put into the hands of the sheriff.—Jones *v.* Jones, 448.
A judgment in favour of the State operates as a lien upon lands from the commencement of the suit, 445.
An absolute judgment against an executor or administrator is conclusive evidence of a sufficiency of assets.—Dorsey *v.* Hammond, 472.

JURISDICTION.

A power given by will to appoint commissioners to make partition cannot authorize the chancellor to proceed *ex parte*.—Howard's case, 367.
The case as set forth in the bill must appear at the hearing to be of such a nature as to fall within the jurisdiction of a court of chancery.—Estep *v.* Watkins, 489.
Consent cannot give jurisdiction where the court has none.—Iglehart *v.* Armiger, 528.
A ship in the harbour of Annapolis was held to be within the jurisdiction of the colonial court of vice admiralty.—Hastings *v.* Plater, 613.

LAND

In England all land held directly or indirectly of the king—the mode of obtaining an estate of inheritance, or a lease for years of the king.—Cunningham *v.* Browning, 301—303.
No land can be absolutely revested in the king, or the title of any one in possession devested without office found, 302.
The discoverer of escheatable land usually rewarded with a lease thereof, 303.
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Formerly in all, and now in some particular cases, an inquest of office was necessary to revest in the proprietary or in the State lands which had been granted to individuals, 306.
The discoverer of escheatable land is rewarded with a portion of its value, 307.
The acts of confiscation invested the State with the title to the lands without office found, 307.
The State takes all land subject to the individual rights which had been acquired from the lord proprietary, 307.
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A sufficient description gives an incipient legal title, and before a patent issues it is an imperfect legal right, not an equitable interest.—Cunningham *v.* Browning, 324.
A patent gives a perfect legal title, which, by relation, takes effect from the commencement of the incipient title, 325.
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An explanation of the term *location* as applied to land, 329.

LEGACY.

An annual sum given for maintenance takes effect from the death of the testator.—Rebecca Owings' case, 296.
The bequest of an annual sum charged upon land in the hands of the holder is a legacy, the payment of which equity will enforce, 296.
Where a person is about to make his will devising his property to a person, and another prevents it by promising to convey the property or pay the money, and the testator in consequence thereof does not so make his will, the promise is valid and may be enforced.—Colegate D. Owings' case, 404.

LIEN.

A judgment at common law operates, as

between the parties, as a lien upon the real estate from the first day of the term; but by statute it only so operates as against purchasers from its date.—Jones *v.* Jones, 447.

Although the lien fastens upon the real estate by the judgment, yet if the case has abated by the death of either party, no execution can issue until it has been revived, 448.

The lien of a judgment does not fasten upon personal estate until the *fieri facias* has been actually delivered to the sheriff, 448.

A judgment in favour of the State operates as a lien upon its debtor's real estate from the commencement of the suit, 445; Hodges *v.* Mullikin, 515.

The nature of a vendor's lien, and how it differs from other liens.—Moreton *v.* Harrison, 498; Iglehart *v.* Armiger, 522.

An assignment of the bond or note given to secure the payment of the purchase money does not carry with it the vendor's lien, but is a tacit relinquishment of it.—Iglehart *v.* Armiger, 524.

There may be two or more equitable liens upon the same land, as well as two or more mortgages, 526.

On a sale under a decree the court is the vendor, and as such the holder of the equitable lien, 527.

If the purchase money be not paid, the court under its equitable lien may order a resale at the risk of the purchaser.—Mullikin *v.* Mullikin, 541.

LUNATIC.

A woman may be appointed committee of a lunatic.—Gibson's case, 141.

A lunatic cannot sue by *prochein amy;* but without being so found lunatic may, under circumstances come in with other persons as co-plaintiffs, who may be appointed to receive the relief as her trustees.—Rebecca Owings' case, 293—295.

Without an inquisition no one can be judicially restrained as a lunatic, 293.

The ordering of an inquisition is discretionary, and a person who is in fact *non compos mentis* may be protected without an inquisition, 294.

Although a father may appoint a guardian to his infant child, yet he cannot appoint a guardian of his adult lunatic child, 295.

On the death of a lunatic, who has been permitted to sue with others as her trustee, the suit abates; and the trustee's authority ceases as to all purposes, but that of closing his accounts, 298.

A suit which has been dismissed by undue influence upon a plaintiff in her dotage, may be reinstated and conducted by her solicitors.—Colegate D. Owings' case, 372.

A person in dotage or an imbecile adult may sue by next friend, 373; *Rothwell* v. *Boushell*, 373.

The person and property of one in dotage, though not declared a lunatic may be protected by the court.—Colegate D. Owings' case, 373—375.

In order to ascertain the mental condition of a party, medical professors may be ordered to visit him and make report to the court, 375.

The maxim of the English law, that no man of full age shall be in any plea to be pleaded by him received by the law to stultify himself and disable his own person, considered and rejected, 376.

Under the general legal term, *non compos mentis*, is comprehended every species of mental derangement which incapacitates a man from making a legal contract, 384.

Non compos mentis, as in idiocy, as in delerium, as in lunacy, and as in dotage, 386—389.

The becoming a lunatic does not release a contracting party from his liability; and therefore the court may appoint a trustee to convey in his name in specific performance of his contract.—Colegate D. Owings' case, 405.

A lunatic defendant may have a guardian *ad litem* appointed to answer for him.—*Rothwell* v. *Boushell*, 373.

MARRIAGE.

The statute of frauds relates only to agreements made upon consideration of marriage.—Ogden *v.* Ogden, 287.

Marriage alone is not a part performance of such an agreement, 288.

A letter may under certain circumstances be deemed a binding contract within the meaning of the statute, 288.

A contract of marriage is the parent not the child of civil society.—Fornshill *v.* Murray, 481.

If a marriage be valid where celebrated, it is valid every where, 485.

It should be solemnized in the face of a church, or with the blessing of a clergyman, 481.

General reputation with some exceptions is deemed sufficient evidence of a marriage, 482.

A divorce can only be effected by an act of the General Assembly, 482.

A county court may inquire into the validity of a marriage, and declare it void, 483.

The court of chancery may perhaps annul a marriage which has been procured by abduction, terror, and fraud, 483.

After the death of husband or wife there can be no judicial proceeding had for the purpose of bastardizing the issue, or barring dower or courtesy, 483.

When a party founds his claim upon the validity of a marriage, or the legitimacy of any one, such validity or legitimacy must be decided by the court, 484.

MONEY.

Money ordered to be paid out to the attorney in fact, or to the solicitor of the party.—Hoye *v.* Penn, 40.

Money will not be paid to the mere guardian *ad litem* of the defendant.—*Corrie* v. *Clarke*, 86.

Money may be brought into court by a trustee under a decree if he doubts as to its proper application.—Wells *v.* Roloson, 456.

To obtain an order upon a defendant to bring money into court, before the final hearing, it must appear, that he who asks it has an interest in the money, that he who holds it has no equitable right to it, and the facts as then shewn must be open to no further controversy.—McKim *v.* Thompson, 156.

After a bill filed if the purchaser, being in possession, exercises acts of ownership he may be compelled to bring the purchase money into court, 161.

Where it is agreed, that a debt shall be secured by negotiable notes payable six months after date, and the party fails to give the notes, the debt shall bear interest from the day when the notes, had they been given, would have fallen due. Chase *v.* Manhardt, 341.

A debt shall not carry interest during the time the debtor is legally restrained from paying it, 342.

If a creditor receives or recovers the principal so as not to relinquish his claim to interest, he may afterwards sue for and recover the interest, 346.

Where there has been no decree to account, but the sum has been ascertained by the auditor by consent, the interest ought not to be made principal as in other cases.—Hoye *v.* Penn, 34.

Where a decree for a sale expressly or tacitly affirms the validity of the plaintiff's claim, interest upon it is a subject of further directions.—Strike's case, 70.

In a creditor's suit the claims as adjusted carry interest until paid, if the proceeds be sufficient to pay all.—*Millar* v. *Baker*, 148.

In a creditor's suit each claimant is entitled to a proportion of the interest arising on the purchase money of the estate sold, according to the sum stated by the auditor to be then due him.—Low *v.* Conner, 469.

MORTGAGE.

Decree to redeem directing an account to be taken of the rents and profits and waste while in possession of the mortgagee, allowing for repairs and lasting improvements.—*Rawlings* v. *Stewart*, 22.

To ascertain the true nature of the contract the court may look into all the contemporaneous agreements and dealings between the parties.—H. K. Chase's case, 225.

The distinction between a mortgage and a sale with a covenant for repurchase, 225.

If the husband and wife join in making a mortgage her right of dower can be affected only to the extent of the mortgage, and she may call on the personal representative of the husband to discharge the mortgage, 227.

Not less than twenty years can operate as a bar of a mortgage or equitable lien although the bond or note may be barred by twelve or three years.—Lingan *v.* Henderson, 282.

A holder of an equitable lien cannot be compelled by the usual notice to come in under the decree in a creditors suit, but if he does come in the purchaser will take clear of his claim.—*Millar* v. *Baker*, 148.

A decree to redeem may be made to result in a foreclosure.—Colegate D. Owings' case, 404; Etchison *v.* Dorsey, 537.

Where the defendant fails to answer, and the mortgage debt is established by the mortgage and the plaintiff's affidavit, no commission need be issued; the bill may be at once taken *pro confesso*.—*Clapham* v. *Clapham*, 127.

A responding defendant will be permitted to shew payments either before a decree or after before the auditor, 127.

NE EXEAT.

A *ne exeat* as well as an injunction may be granted upon the same bill, and at the same time.—*Bryson* v. *Petty*, 182.

ORDERS.

An order to take testimony and to shew cause as to the sufficiency of an appeal bond.—Ringgold's case, 6.

A special order affirming the auditor's report in part, and directing a distribution accordingly.—Hoye *v.* Penn, 36.

Further directions are those orders given for the purpose of following out the equity which has been substantially established by the decree.—Strike's case, 69.

Where a decree declares certain conveyances to be void and directs the property to be sold, it virtually establishes the plaintiff's claim, leaving interest, rents and profits, allowances for improvements, and every thing in relation to the claims of other creditors who may come in for further directions, 70.

The form of an order *nisi* to have the bill taken *pro confesso*.—Burch v. Scott, 114.

An order to give notice of a motion to dissolve an injunction at the then next term.—Jones *v.* Magill, 180.
An order appointing a receiver.—Hannah K. Chase's case, 214; Williamson *v.* Wilson, 423.
An order to take testimony respecting claims in a creditor's suit, 434.
An order calling on the administrator of a receiver to account, 438.
An order overruling pleas and requiring an answer by a given day.—Moreton *v.* Harrison, 496.

PARTITION.

The mode of making partition of an intestate's estate under the act to direct descents.—Hughes' case, 46.
Where the parties take by purchase, partition may be made by the common law in chancery, although some of them be infants.—*Corse* v. *Polk*, 233; *Wells* v. *Roloson*, 456.
In such case a sale may be made of the land if necessary, 233, 456.
The commissioners may award to each his part, or if not, it may be done by lot by the court, 233.
A sum of money awarded by way of equality of partition, may be declared to be a lien upon the share of him directed to pay, 234.
A testamentary direction, that the chancellor shall appoint persons to make a partition cannot give jurisdiction in any way, much less authorize an *ex parte* proceeding.—Howard's case, 367.
The parties should each recommend persons to be appointed commissioners to make partition, 368.
The costs are borne equally or in proportion to the respective shares of each.—Hughes' case, 50.
On a sale to effect a division of a real estate, no one of the distributees or his assignee can take any thing until he has satisfied all that is due from him to the others.—Mullikin *v.* Mullikin, 542.

PARTNERSHIP.

A partner can only be admitted as a creditor against the estate of a deceased partner for his share of the surplus, after all the concerns of the partnership have been fully settled.—*Ringgold* v. *Jones*, 139.
At the instance of a partner alleging that the firm is insolvent, and that his copartners are wasting the effects, a receiver may be appointed.—Williamson *v.* Wilson, 423.
A partnership for a limited time may be dissolved before the expiration of the time by death or insolvency, 424.

PARTIES.

A decree affecting the rights of one not a party is, as to him, fraudulent, and he may be relieved by original bill.—Burch *v.* Scott, 120.
Where the property of several defendants has been sold under a decree to satisfy a debt, leaving a surplus, any one of them may obtain an order directing a distribution of such surplus among them.—Hoye *v.* Penn, 38.
The want of proper parties may be taken advantage of by demurrer, by plea, or at the hearing.—R. Owings' case, 292.
Persons having no interest in the matter may be permitted to come in as coplaintiffs with a person who is in fact *non compos mentis*, in order to take care of his interests, 293—295.
No part of the personal estate of a deceased debtor can be applied in payment of his debts without making his executor or administrator a party to the suit.—Jones *v.* Jones, 460.

PETITION.

Where a matter can only be brought before the court by petition, if the matters therein set forth be not denied on oath, they must be taken to be true.—H. K. Chase's case, 212.

PLEAS AND PLEADING.

If a defendant pleads and answers to the same matter, his answer overrules his plea—and the same principle holds in case of demurring and answering, or demurring and pleading to the same part.—Hannah K. Chase's case, 217.
A plea of the statute of limitation to a bill to recover the purchase money of land.—Lingan *v.* Henderson, 246.
There may be a plea of limitations to some one or more separate and distinct parts of the plaintiff's several causes of suit, 278.
More precision required in a plea than a bill—a plea must be certain, exactly applicable to the case, and tender a material issue, 280.
A plea of the statute of limitations of three years does not apply to a vendor's lien: therefore as against such a lien it must be rejected, 280; Moreton *v.* Harrison, 500.
Where the bill states facts which if true would take the case out of the statute of limitations, a plea of the statute must be sustained by an answer denying such facts, 282, 493.
A defendant may in equity as well as at law plead several distinct pleas.—Moreton *v.* Harrison, 493; *Ridgely* v. *Warfield*, 494.
Duplicity in one and the same plea is a vice in pleading in equity as well as at law.—Moreton *v.* Harrison, 496.
Pleadings in equity are not so strict as at law; yet in equity they must be substantially sufficient.—Lingan *v.* Henderson, 280.
The case as set forth must be of equitable cognizance as contradistinguished from that of common law, or a demurrer will lie or the bill may be dismissed at the hearing, 255.

If any of the essential component facts of the case be not proved, or be disproved, the bill must be dismissed, 255.
If the cause of suit as stated did not exist when the bill was filed, or has been extinguished or barred, the bill must be dismissed, 255.
Where there are a plurality of defendants, and the subject in controversy is divisible, there may be a decree against all for a part, or if they are disjunctively or separately liable there may be a decree against each, 256.
If the defence of any one defendant goes to the whole of one and the same cause of suit, the bill must be dismissed, although as against some others it might have been taken *pro confesso*, 255, 266.
A defendant who can be in no way held liable cannot be allowed to put in a defence against the whole or any part of the case, 276.

PRACTICE.

A party may by petition object to the sufficiency of an appeal bond, and be allowed to take testimony and have the obligors called on to shew cause.—Ringgold's case, 5.
The principles and practice of this court derived from that of England, 18.
Upon a defendant's being returned summoned he may appear and demur, plead or answer.—*Cowell* v. *Sebrey*, 18.
A defendant failing to appear, demur, plead, or answer, after having been summoned, may be attached, 18.
All sheriffs to attend and make return of process, 18.
Where process is prayed against several defendants they must all answer or the case be in a situation to have the bill taken *pro confesso*, before there can be any decree.—Hoye *v.* Penn, 33, 34.
Where two or more sue as joint creditors, the proportion due to each may be adjusted after the sale has been made and the proceeds brought in, 37.
The surplus of the proceeds of sale may be awarded to the representatives of the debtor in proportion to their respective interests, 39.
Money ordered to be paid to the attorney in fact or solicitor of the party, 40.
The trustee under the decree has the control of the suit on the bond against the purchaser, 41.
If a purchaser has no design to baffle the court and is unable to comply, he may be discharged on payment of costs.—Deaver *v.* Reynolds, 50.
A trustee under a decree may be ordered to invest money, and on failing to do so or to bring it into court, may be charged with compound interest.—Latimer *v.* Hanson, 53.
Cases brought here from a county court must be followed out as if they had originated here without revising or reversing any previous order or decree.—Strike's case, 67.
Further directions are those orders given for the purpose of following out the equity established in substance by the decree, 69.
In a creditors suit if a claim be strongly litigated and of difficult investigation, an issue may be sent out to be tried by a jury.—*Ringgold* v. *Jones*, 89.
An order to produce books, &c. can only be obtained by a party interested in such as he particularly specifies, against a party to the suit, 90.
A plaintiff cannot be allowed to split up his claim and bring a separate suit on each part, or to introduce any addition to it after a decree for a sale.—Strike's case, 95.
There is no publication of depositions—all objections to them are open, and may be taken at the hearing, 96.
Where it is desired, that the auditor should state an account from the proofs some of which are objected to, such objection must be first disposed of, 96.
Contracts between a solicitor and suitor for professional services cannot be introduced into or blended with the cause of suit, 98.
A form of an order *nisi* to have the bill taken *pro confesso*.—Burch *v.* Scott, 114.
Orders and decrees may be altered or rescinded during the term; after that only by original bill or bill of review, 120.
The filing of a bill of review or an original bill to set aside a decree does not of itself suspend its execution, 125.
A bill of review for newly discovered matter filed without leave may be dismissed on motion.—*Carroll* v. *Parran*, 125.
A defendant may, on motion, obtain further time to answer, 125.
After the lapse of the time allowed by an order of publication against an absent defendant, he must appear and also answer, or the bill may be taken *pro confesso*.—*Clapham* v. *Clapham*, 126.
During the term an interlocutory decree may be set aside on appearance without answer under the general powers of the court.—*Hepburn* v. *Mollison*, 127.
A decree by default for more than is due may after the term, if the plaintiff has lost no testimony, be set aside to let in a defence upon the merits.—Burch *v.* Scott, 129.
Where a suit has abated by death, to be so entered, and not brought forward on the docket.—Hall *v.* Hall, 132.
A female defendant having married, her husband may be made a party, and an attachment issued against both to enforce an answer.—*Taylor* v. *Gordon*, 132.
A *subpœna ad respondendum* may be served by the sheriff or by any person; but if by any but a legal officer the ser-

vice must be proved.—Hoye *v.* Penn, 29; *Taylor* v. *Gordon*, 132.
It is enough if an affidavit to an answer be as positive as would sustain a prosecution for perjury.—Coale *v.* Chase, 137.
The origin, powers and duties of trustees appointed by the court to sell property.—Gibson's case, 139.
Notice of an order *nisi* for the ratification of a sale under a decree directed to be given by advertising in a newspaper, and also by setting up at the courthouse door.—*Ex parte Margaret Black*, 142.
When a case is set for hearing on bill and answer, all the facts stated in the answer, as well those in avoidance as those responsive, must be taken to be true.—Estep *v.* Watkins, 488.
The plaintiff may set the case down for hearing on bill and answer, because he thereby admits every fact contained in the answer to be true.—Paul *v.* Nixon, 201.
Where a matter can only be brought before the court by petition, if the facts therein set forth be not denied on oath they must be taken to be true.—H. K. Chase's case, 212.
If a defendant pleads and answers to the same matter his answer overrules his plea; and the same principle holds in case of demurring and answering, or demurring and pleading to the same part. 217.
An answer sworn to before a justice of the peace in the District of Columbia, who was certified to be such at the time, received.—Lingan *v.* Henderson, 240.
A certificate of the printer that an order of publication was published as directed deemed sufficient, 240.
An order that a commission issue unless by a day the opposite party name and strike, 240.
It must be shewn by the bill, that the defendant is a nonresident, or that the case is such as to authorize an order of publication instead of a *subpœna*, 245.
An order of publication, as the substitute of a *subpœna*, is passed as of course, and is taken at the peril of the plaintiff, 245.
An order of publication must go against the wife as well as the husband, or she will not be bound, 246.
A defendant cannot object before the commissioners that the evidence is not such as is required by the statute of frauds, 248.
An auditor's report confirmed directing an application of the proceeds with a proportion of interest.—*Wells* v. *Roloson*, 456.
Money brought in and deposited in bank as usual cannot be drawn out but by a special order, 457.
A commission to audite accounts may go to any place most convenient to the parties.—Dorsey *v.* Hammond, 465.
After a claim has been submitted and rejected, the order will not be rescinded to let in new proof upon any ground which would not warrant a bill of review or a rehearing, 473.
Notice of the hearing of contested claims in a creditors suit may be given by publication.—*Spurrier* v. *Spurrier*, 476.
Proof of the publication of an order for creditors to come in, of an order of ratification *nisi*, &c. may be made by the printer's certificate, or by the production of the newspapers, 475.
Where the chancellor doubts the fact or the testimony is obscure, an issue may be sent out to be tried.—Fornshill *v.* Murray, 485.
The act of 1820, ch. 161, does not apply to abatements after a decree; such cases may be revived by *subpœna scire facias*.—Allen *v.* Burke, 544.
After the return of a *subpœna scire facias*, the case may on motion be ordered to stand revived, 546.
The act of 1820, ch. 161, gave a new mode of proceeding only in those cases where a *proper* bill of reviver will lie.—Griffith *v.* Bronaugh, 547.
The mode of taking the answer of an adult or infant defendant.—Snowden *v.* Snowden, 550.
The mode of proceeding by publication against a nonresident infant defendant. *Burd* v. *Greenleaf*, 556.
The origin, nature, and extent of the rule which may be laid calling on the plaintiff to give security for costs.—Mayer *v.* Tyson, 561.
The sufficiency of an injunction bond may be objected to, and further time allowed to put in good security.—Billingslea *v.* Gilbert, 566.
The form of a commission to make partition of lands under the act to direct descents.—Hughes' case, 47.
The sheriff to execute a summons for witnesses to appear before commissioners to take testimony.—*Bryson* v. *Petty*, 182.
The form of a *subpœna scire facias* to revive.—Allen *v.* Burke, 546.

PRINCIPAL AND INCIDENT.

A gift, assignment, or bequest of the principal, carries with it all its beneficial incidents.—Iglehart *v.* Armiger, 524.

PRINCIPAL AND SURETY.

Mere delay without fraud or collusion cannot affect the rights of a creditor against either principal or surety.—Hoye *v.* Penn, 30.
Where two or more are equally or jointly liable either as principals, or as sureties, the property of each may be directed to be sold in the first instance, so as to cause the burthen to bear upon each in due proportion, 32.
In ordinary money bonds there being no distinction between principal and surety, and being alike bound, a case can rarely occur in which the one who is in fact surety may be discharged because of the laches of the obligee.—Hoffman *v.* Johnson, 105.

A surety in a common money bond may come into equity to compel his principal to pay or relieve him from his liability; but not in the case of a bond of indemnity, 105.
The liability of one who stands as surety on negotiable paper, is regulated by peculiar commercial law, 105.
In case of a bond for the performance of services, if there be any undue laches, the surety will be discharged, 106.
Where a creditor receives a chose in action for the purpose of obtaining payment from it, he is bound to use due diligence for that purpose; and on failing to be ready to reassign, 106; Dorsey *v.* Campbell, 357.
A trustee under a decree and his surety called on to pay or shew cause.—Mullikin *v.* Mullikin, 529.
A purchaser under a decree and his surety called on to pay or shew cause, 541.

PRODUCING BOOKS.

An order to produce books, &c. can only be obtained by a party interested in such as he particularly describes.—*Ringgold* v. *Jones*, 90.
The application must be made on oath according to the act of 1798, ch. 84, to produce books, &c.—*Williams* v. *Hall*, 196.
Although the books be held under the direction of a trustee who objects, they must be produced, 196.

PUBLICATION.

After an order of publication against an absent defendant, he must appear and also answer, or the bill may be taken *pro confesso*.—*Clapham* v. *Clapham*, 126.
An order of publication is the substitute for a *subpœna*; hence it must appear by the bill, that the case is such as to authorize such order.—Lingan *v.* Henderson, 245.
The wife as well as the husband must be warned by such order or she will not be bound, 246.
If the case be in fact such as does not allow of such an order the decree will be void; hence the party takes the order as of course at his peril, 246; Snowden *v.* Snowden, 558.
As to publication against absent infant defendants.—*Burd* v. *Greenleaf*, 556.

PUBLIC RECORDS.

An affidavit to an answer to a bill in chancery of this State, or the like, is an authentication called for by the judicial power here, and as such is parcel of the records of this State, and not within the act of congress providing for the authentication of records, &c. of other States. Gibson *v.* Tilton, 353.
Such authentications and the executions of commissions to take evidence allowed and executed by the comity of all nations, and to be encouraged as between the States of this Union, 354.
Although a person cannot be punished here for a false oath taken abroad; yet if such authentication be spurious a party who introduces it may be punished for such an imposition upon the court, 355.

RECEIVER.

The appointment of a receiver does not involve a decision upon any right—it can only be made at the instance of a party who has an acknowledged interest or a strong presumption of title in himself alone or in common with others; and where the property itself or its rents and profits are in danger of being materially injured or totally lost.--H. K. Chase's case, 213; Williamson *v.* Wilson, 422.
Where lands are charged with the payment of an annual sum, a receiver may be put upon it as a means of enforcing payment.—Rebecca Owings' case, 297.
The power to appoint a receiver is now as well established and of as great utility as any which belongs to the court.—Williamson *v.* Wilson, 420.
A receiver may be clothed with authority to take and hold property, to collect debts, &c. so as to meet the exigency of the case, 421.
He is an officer of the court—his appointment alters no right, not even so as to prevent the running of the statute of limitations, 421.
The appointment of a receiver is as little open to abuse as any other judicial proceeding, 422.
A receiver may be appointed before answer at the instance of a partner alleging that the firm is insolvent, and that his copartners are wasting the effects, 422.
The appointment does not of itself divest any one of possession; the possessor may shew cause against a delivery, 424.
A proper person is selected on the recommendation of the parties and on consideration of all circumstances, 427.
A receiver may be compensated by a commission, and allowed for all expenses incurred in the defence and preservation of the property on vouchers being produced, 433.
He is bound so to keep the property as that it may be easily traced, delivered up, or accounted for, 436.
He may be proceeded against in a summary way, or his bond sued on here by *scire facias*, or at law by action, 436.
On the death of a receiver his personal representatives may be proceeded against summarily to enforce payment or delivery, 437.
On a final and full account a receiver or his representatives may be discharged and his bond cancelled, 439.

RELIGION.

A devise to a religious society without the leave of the legislature is void.—Murphy *v.* Dallam, 529.

REMOVED CASES.

Cases brought here from a county court must be followed out as if they had originated here, without revising or reversing any previous order or decree, except in the regular way.—Strike's case, 67.

RENTS AND PROFITS.

An occupying tenant is liable for rents and profits whether he knows of the adverse title or not.—Strike's case, 71.

May be recovered in equity where there is any difficulty at law, or where the title is merely equitable; after the title has been established by the decree, rents and profits may be a subject of further directions, 72.

The account in some cases is carried back only to the filing of the bill, in others to the commencement of the title, 73.

A mortgagee or rightful holder is chargeable only with actual receipts; but a wrongful holder is accountable for the full value or what might have been made, 73.

A claim by a *bona fide* possessor for improvements may be discounted from that made against him for rents and profits or for waste, 79; *Rawlings* v. *Carroll*, 76.

RESURVEY.

The right to take in contiguous vacancy, by a warrant of resurvey from the land office, is incident to the legal title only. Hoffman *v.* Johnson, 110.

REVIEW.

There can be no bill here in the nature of a bill of review as understood in England.—Burch *v.* Scott, 122.

A bill of review, its nature, either for error apparent or newly discovered matter, 122.

The filing of a bill of review or of an original bill to set aside a decree does not of itself suspend the execution of a decree, 125.

A bill of review for newly discovered matter filed without leave may be dismissed on motion.—*Carroll* v. *Parran*, 125.

The allegation of the fact, that the matter is newly discovered on which an application is made to file a bill of review should be then controverted and finally determined so as not to be drawn in question after the bill has been filed.—Hodges *v.* Mullikin, 506.

If the discovery of the new matter was made so long before the decree as to have admitted of an application to have it brought in, a bill of review will not be allowed, 511.

The party must have used reasonably active diligence in searching for and bringing in his proofs, or a bill of review will not be allowed, 511.

Although a bill of review may be refused to a party because of his own demerits, yet it may be granted with a view to the protection of the interests of others, 513.

REVIVOR.

Rules to be observed on the application of the representative of the deceased party to be let in under the act of 1820, ch. 161, to revive on an abatement by death.—*Labes* v. *Monker*, 130.

The mode of reviving given by the act of 1820, ch. 161, applies only to cases of abatement by death, not to abatement by the marriage of a female plaintiff.—Hall *v.* Hall, 132.

That new mode is confined to cases where a proper bill of revivor will lie except as to a devisee, 132.

The act of 1820, ch. 161, does not apply where a *subpœna scire facias* is the proper mode, 133; Allen *v.* Burke, 545.

Where a suit has abated by death, to be so entered and not brought forward on the docket, 132 note.

If the suit abates after a decree affecting both real and personal property, it may be revived by the heirs or personal representatives or by either.—Colegate D. Owings' case, 409.

There may be a revival for costs, 409.

After a decree to account either party may revive.—Griffith *v.* Bronaugh, 548.

ROADS.

A mill race not a building within the meaning of an act of Assembly for opening a new road.—*Worthington* v. *Bicknell*, 187.

SALES UNDER A DECREE.

Where it appears that the person reported as the purchaser had no design to baffle the court, he may be discharged on payment of costs.—Deaver *v.* Reynolds, 50.

Where the property of a debtor has been sold for an amount equal to the whole claim the debtor is discharged, notwithstanding any subsequent depreciation or failure in collecting the proceeds of sale.—Hoye *v.* Penn, 64.

The trustee may be directed to convey to the assignee of the purchaser on the payment of the purchase money, 36, 39.

Under a decree for a sale, in a creditors suit, the then growing crop should not be sold.—*Taylor* v. *Colegate*, 365.

On a sale under a decree the court is the vendor, and as such the holder of the equitable lien.--Iglehart *v.* Armiger, 527.

If the purchase money be not paid the court upon its equitable lien may order a resale at the risk of the purchaser.—Mullikin *v.* Mullikin, 541.

SOLICITORS.

Money may be paid out of court to a solicitor of the party entitled to it.—Hoye *v.* Penn, 40 note.

A commission allowed to solicitors according to an admitted special agreement.—Strike's case, 63, 95.

A contract between a solicitor and suitor for professional services cannot be in-

troduced into and blended with a pending suit, 98.
A solicitor cannot be permitted at any time to divulge the secrets of his client without his consent.—Hannah K. Chase's case, 222.
A solicitor may refuse to act further for his client, but he cannot go over to the opposite party, 222.

SPECIFIC PERFORMANCE.
On a bill to obtain a legal title according to a bond of conveyance, the defendant may be ordered to produce an act of Assembly to confirm the conveyance.—*Rawlings* v. *Carroll*, 75.
Verbal proof in any respect essentially different from the written contract, or of the written part of it cannot be received.—Ogden *v.* Ogden, 287.
If it be doubtful whether a letter, concerning a contemplated marriage, was intended as an agreement to pay a portion or not, the court will not decree a performance, 288.
Where the plaintiff by his bill offers to perform his part, and the answer admits or sets out the agreement which is proved, there may be a decree against each without a cross bill.—Dorsey *v.* Campbell, 359; *Watkins* v. *Watkins*, 359; *Long* v. *Gorsuch*, 361; Etchison *v.* Dorsey, 536.

STATUTE OF LIMITATIONS.
After the claim of a creditor has been contested upon its merits, the heir cannot be allowed to rely upon the statute of limitations.—*McMechen* v. *Chase*, 85.
In a creditors suit if the statute of limitations be not specially objected to a claim, it cannot be taken advantage of.—Strike's case, 91.
In a creditors suit the statute of limitations may be relied on in bar of a claim brought in under the decree, by any one of the original parties or by a co-creditor, 93.
The policy of the statute is, that there should be an end to litigation—it goes to shew, either that the claim never existed, or that it has been satisfied.—Lingan *v.* Henderson, 272; Moreton *v.* Harrison, 501.
The statute applies only by analogy in equity: if the party would have been barred at law he shall be barred in equity, 273.
There are various circumstances which will take a case out of the statute or prevent its operation, 273.
A promise or acknowledgment takes a case out of the statute because of its being a renewment of the contract; and therefore where there is a plurality of defendants, it must come from all or from a then partner or person competent to contract for all, 277.
The statute of limitations may be available against only a part of the cause of suit, 278.
Such a plea cannot be received to enure only to the benefit of him who pleads it against a bond, note, or the like, 278.
Where the purchase money has been secured by an equitable lien, a bond, and a note; twenty years only is a bar to the lien, twelve years of the bond, and three years of the note; but if the bond or note be so barred on suit, that cannot affect the lien in equity, 280, 500.
A partial payment takes the case out of the statute of limitations.—Moreton *v.* Harrison, 493.
On a plea of the statute, if the bill alleges any fact which would take the case out of the statute, such fact must be denied by an answer in support of the plea.—Lingan *v.* Henderson, 282; Moreton *v.* Harrison, 493.
A plaintiff may take advantage of the statute for the protection of his interests.—Watkins *v.* Dorsett, 532.
There is no saving in the act limiting appeals in favour of persons *non compos mentis*.—Colegate D. Owings' case, 408.

TRUSTEE UNDER A DECREE.
A trustee who has obtained judgment against a purchaser upon his bond may have the same land sold under a *fieri facias* upon such terms as he may deem best on consulting with the parties concerned.—Hoye *v.* Penn, 41.
A trustee may be required to invest money in his hands, and on his failing to do so or to bring it into court, may be charged with compound interest.—Latimer *v.* Hanson, 53.
He is not bound to accept or to continue in the office; but if he does do so, he must obey the orders of the court, 56.
This court has the power, independently of any act of assembly, to employ a trustee to execute its orders or decrees by a sale or otherwise.—Gibson's case, 139; *Pue* v. *Dorsey*, 139.
A trustee is regarded as the legal ministerial officer of the court, 139.
A *feme sole* may be employed as a trustee, 141; *Ex parte Margaret Black*, 142.
In a creditors suit the widow may be appointed trustee, so that the commissions may be saved to her and her children.—Gibson's case, 141.
The register of this court, the clerk of a court, an infant, a *feme covert*, a non-resident, or an officer of the army or navy cannot be appointed trustee, 143.
A trustee being appointed during pleasure may at any time be removed for cause, 143; Mackubin *v.* Brown, 412; Mullikin *v.* Mullikin, 539.
In the selection of a trustee recommendations are heard, and all circumstances considered.—Gibson's case, 143.
Where the decree directs the property to be advertised for sale, the trustee must so put it into the market; but after that

he may sell as he can, 144; Mackubin *v.* Brown, 415.
He cannot give notice to creditors without an order from the court.—Gibson's case, 144.
Commissions to trustees are regulated by act of Assembly and by rule of court, 145—147.
A trustee may employ an auctioneer to whom a fee of five dollars may be allowed for each separate sale, 147.
The commissions of a trustee may be increased, diminished, apportioned, or withheld according to circumstances, 147; *Millar* v. *Baker*, 149.
If a trustee fails to bring in or account for the money, bond, or notes, he may be charged with the whole amount of the sales.—Mackubin *v.* Brown, 416.
Bonds and notes may be assigned to the parties in satisfaction of their claims, but it is most usual to suffer the trustee to hold them for collection, 416.
By holding the trustee liable the court neither parts with any lien, nor exonerates any one else, 417.
A delinquent trustee cannot be let in to have the benefit of a discount as against any claimant in the case, 417.
Where a report of the auditor has been affirmed, and the trustee directed to distribute the proceeds accordingly, he must distribute the amount in hand according to that proportion, and the residue in the same way as received.—Iglehart *v.* Armiger, 521.
A trustee and his surety may be called on to bring the money into court or shew cause.—Mullikin *v.* Mullikin, 539.

VENDOR AND VENDEE.

Land sold in a body, by a designated name, or by the acre, there can be no claim for deficiency.—Hoffman *v.* Johnson, 109; *Murdoch* v. *Beal*, 109.
But it is otherwise if it be sold by the tract containing so many acres more or less, 109.
To every grant of land from the State there is an implied warranty to make up the specified quantity to the holder, 110.
A holder of the *legal* title may by a warrant of resurvey take in any contiguous vacancy, 110.
A vendee has a right to, and is bound to take all incidents to the land he purchases, and therefore must take land which the vendor has included by a warrant of resurvey.—Hoffman *v.* Johnson, 110.
Land devised to be sold was sold by the executor under an apprehension, that he was authorized to do so, the sale was affirmed.—*Ex parte Margaret Black*, 142.
After a bill filed, if the purchaser, being in possession, exercises acts of ownership, he may be compelled to bring the purchase money into court.—McKim *v.* Thompson, 161.
A purchaser has a right to demand a sound legal title, unless it has been otherwise distinctly understood at the time of the purchase.—*Stewart* v. *Barry*, 192.
To ascertain the true nature and meaning of a contract the court may look into all the contemporaneous dealings and agreements between the parties.—Hannah K. Chase's case, 225.
The forms by which a *feme covert* of full age may legally convey her right to real estate or bar her right to dower, 228.
The origin and objects of recording conveyances for land, 230, note.
The usual receipt for the purchase money on a deed for land is evidence of the lowest order.—Lingan *v.* Henderson, 249.

WASTE.

A mortgagee in possession may be charged with, and made to account for waste.—*Rawlings* v. *Stewart*, 22.
On a bill for specific performance the defendant being unable to make a valid title was perpetually injoined from recovering the purchase money, and the plaintiff ordered to account for waste beyond what might have been proper in the use of the land.—*Rawlings* v. *Carroll*, 76.
The difference between waste and trespass.—Duvall *v.* Waters, 571.
An injunction may be granted here to stay waste in any case in which it would be allowed by the English law, 576.
The nature and office of a writ of estrepement, 573.
The writ of prohibition to stay waste, 572.
Where waste has actually been committed the plaintiff under an injunction bill may have an account of waste, 577.
There is no common law mode of preventing a threatened trespass, 573.

WITNESSES.

A summons for witnesses to depose before commissioners to take evidence must be served by the sheriff if required, upon which their attendance may be enforced by attachment.—*Bryson* v. *Petty*, 182.
The policy of the law does not permit a solicitor to divulge the secrets of his client without his consent.—Hannah K. Chase's case, 222; Hodges *v.* Mullikin 509.
A commission may be granted to take the deposition *de bene esse* of an aged and infirm witness.—Lingan *v.* Henderson, 238; *Rymer* v. *Dulany*, 238.
A witness may be compelled to attend and give evidence under a commission sent here from another State.—Gibson *v.* Tilton, 354.

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